THE CENTRAL LAW JOURNAL.

SEYMOUR D. THOMPSON, Editor. | ST. LOUIS, FRIDAY, MARCH 3, 1876. | Hon. JOHN F. DILLON Contributing Editor.

BABCOCK'S CASE.—Elsewhere we print the charge of the court to the jury in this remarkable case. It consists first of a grouping for the aid of the jury of the salient features of the testimony relied on to convict, and of a statement of the respective theories of the prosecution and defence relative thereto. The law in regard to the effect of circumstantial evidence, the testimony of co-conspirators, the doctrine of reasonable doubt, and evidence of good character, is then clearly and justly stated. The charge ends with an impressive admonition to the jury not to let considerations of the enormity of the offence charged, or political considerations obscure the real issue in the case, namely, whether the defendant is guilty, or not guilty. Certain political journals, incensed at the acquittal of Babcock, have animadverted upon this charge in strong terms. We fail to see in it a syllable of legal error, or a line of undue bias towards the accused. The court nowhere even intimate an opinion as to the weight of the evidence, except as to the fact of the existence of the conspiracy; and the jury received only the cautions which a jury should receive in every case where the evidence is wholly circumstantial, and where party bias obscures in the public mind the real merits of the contest. We appeal to the enlightened members of the legal profession to bear us out in the assertion, that whatever political journals for partizan purposes may say to the contrary, this was an able, colorless and impartial presentation of the case to the jury. If it was favorable to the accused, it was because the testimony adduced necessarily made it so. The evidence was wholly circumstantial; there was no adequate proof of motive; the whole substance of the government's case was that on two separate occasions Babcock had aided the conspirators, but whether with a guilty knowledge and corrupt purpose or not, was left wholly to conjecture. It is admitted on all hands among the members of the Saint Louis bar to have been a weak case, and it is to the credit of our state that a jury composed of members of both political parties refused to destroy a man on such testimony. In contrast to the animadversions of a portion of the lay press, we find in the columns of one of the ablest law journals published in the English language, whose editor we happen to know is no admirer of the peculiar school of politicians to which Babcock belongs, a high encomium upon the fairness with which the trial has been conducted. The *Albany Law Journal* says: "The manner in which Judge Dillon has presided on the trial of Babcock, in St. Louis, is to be commended in the highest terms. He has exercised the utmost prudence and fairness in the admission of evidence, and has refrained, at all times, from commenting on its effect, believing, that where evidence is competent, it is for the jury to decide on its weight. This was conspicuously shown in his ruling on the motion to direct the acquittal of the defendant after the testimony was in. Again, in the argument of counsel, Judge Dillon manifested a commendable respect for the rights of all parties, by checking, to some extent, allusions to outside matters, which had not been introduced in evidence. While considerable latitude should be allowed to counsel in summing up, they should not be allowed to state things on their own knowledge of which they have advanced no proof. Judge Dillon declared that he intended to interpose in such cases, and if counsel would not object to statements not connected with the testimony, he would do so himself. The course of Judge Dillon, not only on this trial, but throughout his entire career as a judge, entitles him to rank among the very highest of our administrators of justice."

Proving One's Innocence.

Some of the partisan newspapers, in their insane rage over Babcock's acquittal, demand to know why, if he was innocent, he did not prove his innocence. This is certainly a novel doctrine which the eminent jurists who preside over these journals would import into our jurisprudence. Suppose the editor of the *Globe-Democrat* should say, "The editor of the *Republican* is a horse-thief; if he is not, let him prove it." Would any fair and candid man hold the editor of the *Republican* bound to offer any explanation whatever, in consequence of this accusation? And yet it is no less than this that the editor of the *Republican* in his leader of the 22d of February called upon Babcock to do, and the editor concluded that because he had not done it, he was guilty. We apprehend that most thoughtful men will agree that the old law is better than the novel doctrine which these heated reformers would engraft upon it. The existing rule, as we understand it, is that an accused person is not called upon for proofs of his innocence until his accusers have proved him guilty; that the presumption of innocence always attends him; and that, except in a few cases, as where insanity is set up as a defence, the burden of overcoming that presumption always remains with the government. But the injustice of calling upon a man to prove his innocence when the evidence against him is wholly circumstantial, and when in addition to its being circumstantial, it is weak and inconclusive, and when, in addition to all this his mouth is sealed and he can not explain, except it may be through the testimony of others;—under these circumstances the injustice of saying that a man should be convicted unless he proves his innocence, is very great. The rule, as we understand it, is that the jury is never authorized to infer guilt from the failure to explain circumstances which, though suspicious, do not make out a case of guilt. This doctrine is well illustrated by a recent case quoted by Judge Porter in his argument for the defence in Babcock's case. We allude to the case of Chaffee v. The United States, 18 Wall. 516. That case was an action for penalties for alleged frauds on the revenue,—a civil case, where the defendant was permitted to testify,—and *a fortiori*, the rule would be equally strong in criminal prosecutions. The court below instructed the jury, that it was a rule, that where a party has proof in his power, which, it produced, would render material facts certain, the law presumes against him if he omits to produce it, and authorizes a jury to resolve all doubts adversely to his defence. "If then," continued the court, "you conclude that, unexplained and uncontroverted by any testimony, the pending proof would enable you to find against the defendants for the claim of the government or any material part of it, you will then take all this testimony in view of the principles stated, that of presuming against the party who fails to produce proofs in his possession." The Supreme Court, Mr. Justice Field delivering the opinion, characterized this instruction as follows: "The purport of all this was to tell the jury that although the defendants must be proved guilty beyond a reasonable doubt, yet if the government had made out a *prima facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors. Their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and

if they did not, they were guilty beyond a reasonable doubt. We do not think it at all necessary to go into any argument to show the error of the instruction. The error is palpable on its statement, and the authorities condemn it. The instruction sets at naught established principles, and justifies the criticism of counsel, that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what by law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction."

Bab-lings.

Not guilty.———Not guilty, but don't do it again.——— "Dead dog. Goose hangs altitudelum. The sun shines."——— Judge Chester H. Krum has been engaged for the defence in all the whiskey-ring cases which have been tried in Missouri, and on the whole has not been very successful—not by his own fault, however, but through the fault of his clients. He lost Joyce, McDonald, Avery, McKee and Maguire; but then he has saved Babcock, and that is a great point gained.———The *Irish World* says that "Peddrick is a corruption of Patrick, or rather, another way of spelling that historic name. He is an Irishman, and though the youngest, is one of the most brilliant of the whiskey-ring prosecutors. It is not true that Joyce is an Irishman."——— It may be true that a prophet is not without honor, save in his own country; but there are doubtless some prophets who would gladly be delivered from the honor they get in other countries. *Frank Leslie's*, in noticing the government counsel in the Babcock case, says that Mr. Bliss has a smooth-face boyish look, and that Mr. Paddock (*sic*) appears stage-struck.———When Dyer said in his speech that the accused was defended by counsel of world-wide reputation, a serene smile lit up the classic features of Judge Porter—he knew it meant him; and the intellectual eyes of Mr. Storrs shot forth a gleam of satisfaction—he thought it meant him; and Judge Williams drew down the muscles of his face and endeavored to avoid looking bashful—he feared it meant him; and the tall form of Judge Krum elongated itself slightly—he thought it might include him.———It is not generally known, but it is nevertheless true, that all the indictments in the Saint Louis whiskey-ring cases were drawn by Mr. Bliss, the modest but efficient assistant district attorney. These indictments have stood the test of the assaults which have been made upon them, with the exception of one which was quashed in November last by Mr. Justice Miller, after much hesitation, on the ground of the merger of a misdemeanor in a felony—a doctrine which, as will be seen by the case of Hunter v. Commonwealth (2 CENT. L. J. 129), has lately been driven by the Supreme Court of Pennsylvania from one of the last of its American strongholds. Copies of Mr. Bliss' indictments were taken by the government attorney for the Indianapolis district, and were used as models in framing the indictments on which several of the ringsters have been convicted in that city. If Mr. Storrs is entitled to the *soubriquet* of "the Great Objector," Mr. Bliss is certainly entitled to be called "the Great Indicter."———Mr. Peddrick, one of the efficient assistants of District Attorney Dyer was for several years stenographer to the attorney-general. While so engaged, he devoted his leisure to the study of law, and, at the instance of Attorney-General Williams, received the appointment which he now holds. He has had but one opportunity to distinguish himself in the whiskey-ring cases, and that was in the opening speech in the McDonald case; and he acquitted himself so well that many of the members of the bar count his speech one of the best which has been made in any of these trials.———In his first day's speech for the defence, on Saturday, the 19th of February, Mr. Storrs exerted himself to such an extent that he was seized with palpitation of the heart, and was forced to ask the court to adjourn before the hour for adjournment had arrived. He fairly broke down after giving utterance to the following burst of fervent eloquence: "In the presence of these facts—which are in this record, gentlemen of the jury, and which can not be removed from it—I denounce the charge there made against this defendant as participating in the appointment of Maguire for a guilty purpose, as wicked and cruel to the last degree. In the presence of these facts, of these dumb and boisterous letters and telegrams which yet speak trumpet tones, I would, before I would utter, as a juror or a citizen, a verdict of guilty to be adduced from them, tear my heart from my bosom and see it lie quivering before me. I know, gentlemen of the jury, that you possess the physical power to do certain things, but you have not got the power—and if you had you would not undertake to exercise it—to adduce guilt from that series of dispatches. Why, gentlemen of the jury, what a tremendous price you would have to pay to reach such a conclusion as that. A broken pledge, a violated oath, an outraged conscience would be the price which you must pay for such a verdict on these facts; and leaving this jury-box, as you will at the conclusion of this investigation, if you say that they mean guilt, that conscience which you always carry with you would pursue you like an unrelenting Nemesis to the last days that you live. It would dog your footsteps like a shadow, and you could never shake it off, and into your very souls would such a crime burn, and burn, and burn, as if a blazing iron had been plunged into it. You can reach no conclusion of guilt from that series of dispatches, and go home to your homes and look your wives and your children in the face. You can not go out among men and carry a sense of humanity with you if you reach a conclusion of guilt from these papers that I have read to you. Why, rather than do that you had better take your farms and your houses and sink them deeper than ever plummet sounded. If you do it, go back to the fields that you have left, to the children that look to you for an example in the future and say to them: 'Here I come; here I am; soul, conscience, honor, all gone, because Dyer and Broadhead asked me to let them have them for a while.' Gentlemen of the jury, you can make of these facts no such mistake as that. There they are. They were planted in the earth when the circumstances occurred, and they will remain there forever. The waves of party passion may beat and surge against them, but they will resist them like the eternal rocks that bound and hedge in the sea. Is it not better, infinitely better, and are not our hearts all lifted up and exalted, when, getting into the smoke and fog, and vapors of this charge, we pour the grateful sunshine, coming straight from the throne of the Almighty into it, and they are dispelled, and we breathe the pure, clear atmosphere of heaven again? Coming from these calumnies and slanders, with which the public ear has been deafened for these long and dreadful months that have passed, it seems like coming out of the close and prisoned walls of a dungeon, where pestilence reigns, holding our faces and our breasts out, and letting the clear breeze from the hill-tops blow the blessings of the Almighty into the face and soul. Isn't it splendid, after all, lifting ourselves away above these little prejudices which have environed us; isn't it grand to say, 'Thank God! republican, liberal and democrat alike, the great names of our history are dear to us alike; it is a delight, the like of which we have never before experienced; it is a glowing delight, heavenly almost in the joy which it gives in that what was dark as guilt, we find innocence so perfect and complete that it is almost radiant in its character?' I can not, gentlemen of the jury, discuss these questions without feeling as if I were lifted away above myself, as if there were an inspiration raining down upon me and upon you. If there is anything that makes a man noble among men, that demonstrates the fact that there are things about us and in our nature, which are divine, it is that blessed sense of eternal justice which prefers to believe in innocence

rather than, with a satanic malignity, to believe in guilt."

———Some partisan journals have raised a great howl over Babcock's acquittal, and finding nothing else to vent their spleen upon, have directed their vituperation against the honest and able judges who presided at the trial. One has discovered that Judge Dillon was influenced in his rulings and instructions by the hope of being appointed to the Supreme Bench in place of Mr. Justice Clifford, who, according to this scribbler's ingenious conjectures, must soon retire. The absurdity of this consists in the fact that no vacancy on that bench is ever filled by an appointment outside the circuit in which it occurs. We understand that a German paper of this city has gone further, and made direct insinuations of bribery. The judges of course are precluded from making any reply to the insinuations of these narrow-gauge editors, who judge upright men by their own vile and contracted standard. "As little shall the Moon stop for the baying of wolves. Then howl your idle wrath, while she still silvers o'er your gloomy path."

———If the learned jurist who edits the Saint Louis *Times* could have charged the jury instead of Judge Dillon, he might have delivered himself of something like the following: "Gentlemen of the jury, the court knows from experience and will take judicial notice of the fact that the evidences of fraud are seldom open and direct; but, as my Lord Coke says, fraud like a snail always leaveth its track in the slime. There are several such tracks in this case. If you follow them in one direction they converge inevitably towards guilt. And whilst it is true that if you follow them in the other direction, they lead towards innocence, yet the inclination of the court would be not to follow them in that direction. The court instructs you, gentlemen, that this trial has not been instituted for the discovery of innocence, but for the unmasking of guilt; and therefore you will follow the tracks in the direction of guilt; and if the defendant has succeeded in adroitly covering up the trail, that must not prevent you from finding him guilty as charged."

Jurisdiction—Writs of Error from Supreme Court of United States to State Courts.

BOLLING v. LERSNER.

Supreme Court of the United States, October Term, 1875.

The principle applied that the Supreme Court of the United States will not re-examine the judgment or decree of a state court simply because a federal question was presented to that court for determination, and that, to give jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered.

In error to the Supreme Court of Appeals of the state of Virginia.

Mr. Chief Justice WAITE, delivered the opinion of the court.

The Circuit Court of Fauquier county, Virginia, rendered a decree in this cause, September 13, 1867. From this decree Lersner prayed an appeal to the District Court of Appeals, May 17, 1869. This was allowed by W. Willoughby, Judge. Upon t. is allowance the appeal was docketed in the appellate court, and the parties appeared without objection or protest, and were heard. Upon the hearing the decree of the circuit court was reversed, and the cause remanded with instructions to proceed as directed. When the case came to the circuit court upon the mandate of the appellate court, Bolling appeared and objected to the entry of the decree which had been ordered, for the reason, among others, that Willoughby, the judge who allowed the appeal, had been appointed to his office by the commanding general exercising military authority in Virginia, under the reconstruction acts of Congress, and that those acts were unconstitutional and void. This objection was overruled and a decree entered according to the mandate. From this decree Bolling took an appeal to the supreme court of appeals, where the action of the circuit court was affirmed. To reverse this decree of affirmance, the present writ of error has been prosecuted.

We can not re-examine the judgment or decree of a state court, simply because a federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered.

In this case, Bolling presented to the court for its determination, the question of the constitutionality of the reconstruction acts. This was a federal question, but the record does not show that it was actually decided, or that its decision was necessary to the determination of the cause. While it, perhaps, sufficiently appears that the judge was appointed under the authority of the acts in question, it also appears that he was acting in the discharge of the duties of his office, and that he had the reputation of being the officer he assumed to be. It also appears that after the allowance of the appeal the case was docketed in the appellate court; that Bolling appeared there; that he submitted himself to the jurisdiction of that court without objection, and presented his case for adjudication; that the case was heard and decided, and that the objection to the qualification of the judge who allowed the appeal, was made for the first time in the circuit court, when the case came down with the mandate.

From this, it is clear that the case might have been disposed of in the state court, without deciding upon the constitutionality of the reconstruction acts. Thus, if it were held that the objection to the authority of the judge came too late, or that the allowance of an appeal by a judge *de facto*, was sufficient for all the purposes of jurisdiction in the appellate court, it would be unnecessary to determine whether the judge held his office by a valid appointment. We might, therefore, dismiss the case because it does not appear from the record that the federal question was decided, or that its decision was necessary.

But if we go further and look to the opinion of the court which, in this case, has been certified here as part of the record, we find that the federal question was not decided. All the judges agreed that Willoughby was a judge *de facto*, and that his acts were valid in respect to the public and third parties, even though he might not be rightfully in office. In this, the court but followed its own well considered holding, by all the judges, in Griffin v. Cunningham, 20 Gratt. 31, approved in Quinn v. Commonwealth, 20 Gratt. 138, and Teel v. Yancey, 23 Gratt. 691, and the repeated decisions of this court. Texas v. White, 7 Wall. 733; Thorington v. Smith, 8 Wall. 8; Huntington v. Texas, 16 Wall. 412; Horn v. Lockhart, 17 Wall. 580.

It follows that the motion to dismiss for want of jurisdiction must be granted.

Appellate Procedure — Bills of Exceptions, when Signed.

MUHLER *ET AL.* v. EHLERS.

Supreme Court of the United States, October Term, 1875.

A bill of exceptions signed after the adjournment of the term at which the cause was tried, unless authorized by an order of court made during the term, or by consent of parties, or unless under very extraordinary circumstances, will be treated as a nullity in the supreme court. United States v. Breitling, 20 How. 253, distinguished. "That case went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation."

In error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Mr. Chief Justice WAITE delivered the opinion of the court.

The parties to this suit, by stipulation in writing filed with the clerk, waived a jury and submitted to a trial by the court. Pursuant to this stipulation, a trial was had at the October term. A. D. 1872, when the case was taken under advisement. At the next term, and on the 28th April, 1873, the court found generally for the plaintiff, whereupon defendants moved for a new trial. This motion was continued until the next term, when, on the 15th July, it was overruled and judgment entered on the finding.

On the 25th July, 1873, this writ of error, returnable on the second Monday of October then next, was sued out and served, and on the same day a *supersedeas* bond was approved and filed. The citation was filed August 4, 1873.

Down to this time, as appears by the record, no bill of exceptions had been signed or allowed, and there had been no special finding by the court. Time was not given, either by consent of the parties, or by order of the court, for the

preparation of a bill of exceptions. In this condition of the case the court adjourned for the term.

At the next term, on the 27th October, 1873, and after the return day of the writ of error, a bill of exceptions was signed and filed by order of the court, as of the 28th April, 1873. It no where appears from the record that this was done with the consent of the plaintiff or even with his knowledge. It is for errors appearing in this bill of exceptions alone, that a reversal of the judgment is now asked.

It perhaps sufficiently appears from the bill of exceptions, if it is to be taken as a part of the record, that the rulings complained of were excepted to in proper form at the time of the trial, but it does not appear that the bill of exceptions was filed, signed, tendered for signature, or even prepared, before the adjournment of the court for the term at which the judgment was rendered. No notice was given to the plaintiff of any intention on the part of defendants to ask for the allowance of a bill of exceptions, either during the term or after. No application was made to the court for an extension of time for that purpose. No such extension of time was granted, and no consent given.

Upon the adjournment for the term, the parties were out of court, and the litigation there was at an end. The plaintiff was discharged from further attendance, and all proceedings thereafter, in his absence and without his consent, were *coram non judice*. The order of the court, threfore, made at the next term, directing that the bill of exceptions be filed in the cause as of April 28, 1873, was a nullity. For this reason, upon the case as it is presented to us, the bill of exceptions, though returned here, cannot be considered as part of the record.

This case differs very materially from that of U. S. v. Breitling, 20 How. 253. There the bill of exceptions was prepared during the term and presented to the court for allowance, four days before the adjournment. It was handed back to the attorney presenting it, three days before the adjournment, with the request that he submit it to the opposing counsel. Delay occurred, and the signature was not actually affixed until after the term. Under the special circumstances of that case, the signature, after the term, was recognized as proper. The particular grounds for this ruling are not stated, but it was probably for the reason that, upon the facts stated, the consent to further time beyond the term for the settling of the exceptions might fairly be presumed. That case went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation. It was said by this court in Generes v. Bonnemer, 7 Wall. 565, that "to permit the judge to make a statement of the facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record, entirely in the power of the judge, without hearing and without remedy." This language is substantially adopted in Flanders v. Tweed, 9 Wall. 428, where it said "the statement of facts by the judge is filed upon the 29th May, 1868, nearly three months after the rendition of the judgment. This is an irregularity, for which this court is bound to disregard it and to treat it as no part of the record."

As early as Walton v. U. S., 9 Wheat. 651, the power to reduce exceptions taken at the trial to form and to have them signed and filed was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the court during the term or consent of the parties, save under very extraordinary circumstances. Here we find no order of the court, no consent of the parties, and no such circumstances as will justify a departure from the rule. A judge can not act judiciously upon the rights of parties after the parties in due course of proceeding have both in law and in fact been dismissed from the court.

The judgment is affirmed.

—The Russian government has promulgated an official ukase prohibiting women from practicing as barristers in the courts.

—The death of Reverdy Johnson recalls a story about the remark which Judge Grier made to him after he had finished a plea before the Supreme Court. The Judge used to indulge in an occasional cat nap, but on this occasion the stentorian tones in which Mr. Johnson had delivered his argument, had prevented the enjoyment of the usual luxury, and he said, "Johnson, I wish you wouldn't speak so very loud when you argue cases before this court. I can't snooze a moment."—[*Washington Chronicle.*

Action by Attorney for Professional Services.

W. W. SOUTHGATE v. ATLANTIC AND PACIFIC RAILROAD COMPANY.

Supreme Court of Missouri, October Term, 1875.

Hon. David Wagner,
" Wm. B. Napton,
" H. M. Vories,
" T. A. Sherwood,
" Warwick Hough, } Judges.

1. Evidence—Power of Officers of Corporations. The power of the officers of a corporation to employ counsel is implied, and need not be proved. Such officers have power to engage attorneys without receiving any express delegation thereof.

2. Same—Value of Services. To prove the value of certain services, the evidence should show what those particular services are reasonably worth, not what is the value of services generally.

3. Same—Corporation how bound by Act of Legislature. To bind a corporation, it is not enough to show an act of the legislature which states that the corporation assumes certain liabilities, but evidence must be given showing that the corporation accepted the act.

4. Interest. In Missouri interest on an account is not allowable until after demand of payment has been made.

Pomeroy and *Corse*, for plaintiff; *C. C. Bland* and *J. N. Litton*, for defendant.

Wagner, J., delivered the opinion of the court.

The plaintiff, an attorney, brought this action to recover the reasonable value of certain professional services, alleged to have been rendered defendant, and of certain other services rendered another corporation, which, it is alleged, the defendant promised after the services had been rendered to pay.

The first count in the petition claimed fifteen hundred dollars for services performed, and for counsel and services as an attorney-at-law, rendered at defendant's request.

The second count claimed that the sum of one hundred and thirty dollars for legal services rendered the South Pacific Railroad, which it was averred the defendant assumed and promised to pay. The answer was a denial of all the allegations contained in the petition. The bill of particulars accompanying the first count referred to certain specific cases attended to, and stated a demand for counsel and services as an attorney generally from March 15th, to October 15th, 1867. The bill of particulars to the second count showed the items for which the services were claimed. The plaintiff gave testimony in his own behalf and stated that the services were performed, and that he was employed by the superintendent of the road and that he at different times corresponded with the various officers and managers of the road and that they recognized him as an attorney and acquiesced in his employment.

He also proved by a witness, against the objection of the defendant, that the services of a good attorney at the place where plaintiff was, would be reasonably worth two hundred dollars per month. The evidence in reference to the second count showed that the plaintiff was employed by a local agent of the South Pacific Railroad, but there was no evidence to show any promise by the defendant to pay the debt.

The court instructed the jury that if they found that plaintiff was in the service of the defendant, and in the service of the South Pacific Railroad in manner as alleged in the respective counts of the petition, they should find for plaintiff the reasonable worth or value of the services, with interest at six per cent. from the accruing of the indebtedness. There was a verdict and judgment for plaintiff on both counts.

It is insisted by the defendant that before the plaintiff could recover, it was necessary for him to show that the officers who employed him, had authority from the corporation to make the employment. We think differently. The evidence shows very clearly that the defendant availed itself of the services of the plaintiff, running through a period of several months with a full knowledge of all the facts, and if there was any defect in the authority conferring the original appointment, this would amount to a ratification.

The rule is that not only the appointment, but the authority of the agent of a corporation may be implied from the adoption or recognition of his acts by the corporation. Kiley v. Forsee, 57 Mo. 390.

Managing officers of corporations have power to employ attorneys and counsellors, without express delegations of power, or formal resolutions to that effect. Western Bank v. Gilstrap, 45 Mo. 419. In discussing this question in Am. Ins. Co. v. Oakley, 9 Paige, 496, the Chancellor said: "It is a

matter of every day occurrance for the president and other officers of corporations to employ and retain attorneys and counsel to prosecute or defend suits, or to assist in legal proceedings in which the corporation is interested. And I doubt whether it is usual for members of the bar to take the precaution to inquire when they are thus retained, whether there has been a formal resolution of the board of directors authorizing their retainer in the case."

The evidence of the witness as to the value of the services was improper. He testified that the services of a good attorney would be reasonably worth two hundred dollars per month. His attention should have been called to the services rendered and his opinion should have been asked what such services were worth. The only evidence introduced by the plaintiff to show that the defendant was liable for the debt of the South Pacific Railroad company, was the second section of the act of March 15th, 1871, which enacted that, "on the said two companies filing in the office of the secretary of state a certificate of their respective corporate seals, and the signatures of their respective presidents and secretaries, to the effect that they have availed themselves of the privileges of this act, such merger and consolidation shall *ipso facto* become complete, and from henceforth the Atlantic and Pacific Railroad Company shall by that name have and possess all the rights, powers, privileges, immunities, advantages, franchises and property whatsoever of said South Pacific Railroad Company in the same manner and to the same extent and effect as that company had or possessed, or but for its said sale and conveyance might have had or possessed, provided that the before mentioned Atlantic and Pacific Railroad Company shall be subject to all the duties, liabilities, obligations and restrictions resting on either of said railroad companies before the consolidation herein referred to and authorized."

The defendant would be liable for the debts and liabilities of the South Pacific Railroad if the consolidation authorized took place. But we cannot take judicial notice of the fact that the companies accepted the act and consummated the consolidation, and there was no proof on the subject.

The court erred in instructing that the plaintiff was entitled to six per cent. interest from the time that the indebtedness accrued. The statute provides that creditors shall be allowed to receive interest at the rate of six per cent. per annum, when no other rate is agreed upon, for all moneys after they become due and payable on written contracts, and on accounts after they become due and demand of payment is made. 1 Wag. Stat. p. 782, sec. 1.

The suit was on an account, and therefore interest was not allowable until demand of payment was made, and it was not shown that any demand was ever made.

The judgment should be reversed and the cause remanded. Judges Napton and Sherwood concur. Judges Vories and Hough absent.

Negligence — Consequential Damages — Remoteness.

SNEESBY v. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.*

English Court of Appeal, from the Queen's Bench, November 8, 1875.

Negligence—Consequential Damages—Remoteness.—Cattle of the plaintiff were driven along a road across which were some sidings belonging to the defendants, when some trucks of defendants were negligently allowed to run down it, across the road, separating the cattle from the drovers, and frightening them so that some of them ran down the road, broke through an imperfect fence into an orchard, whence they strayed upon defendants' railroad, and were killed by a passing train. *Held*, that the defendants were liable, and that the damage was not too remote; and that the imperfect construction of the orchard fence was no defence to the action.

The animals in controversy were killed under the following circumstances:—On the 24 of September, 1872, the cattle killed, with others, arrived at defendants' railway station and were received by the plaintiffs' drovers, who fed them, and about eleven o'clock drove them along an occupation road to some fields. The occupation road is crossed on a level by certain sidings belonging to the defendants, which are not fenced in any way, and the said sidings form a steep incline from the railway to the road. While the plaintiffs' beasts were crossing the said sidings a number of trucks were, by the negligence of the defendants' servants, allowed to run down the sidings between the beasts in question and the drovers, separating the beasts from the drovers, and terrifying the beasts, which rushed along the occupation road out of the control of the drovers.

Next morning the six beasts in respect of which this action was brought were found dead or dying upon the defendants' main line of railway, about a mile from where they appeared to have got upon the line.

It appeared from the track of the beasts that they had gone about a quarter of a mile down the said occupation road, and then had passed through a defective fence into an orchard adjoining the main line, and had strayed upon the main line from a part of the orchard where there was no fence.

The orchard was the property of the defendants, but in the occupation of a tenant, who was bound by the terms of his agreement to keep the fences in repair.

At the trial the learned judge directed a nonsuit, but reserved leave to the plaintiffs to move to enter a verdict for £152 15s., if the court should be of opinion that, upon the facts, the defendants were liable.

A rule *nisi* was accordingly obtained, and afterwards made absolute by the Court of Queen's Bench, on the 3rd of February, 1874, on the ground that the defendants were guilty of negligence in allowing the trucks to slip down the incline, and also of a breach of duty with regard to the fences of their line.

Against this decision the defendants now appealed.

Herschell, Q.C., and *Beasley*, for the defendants, urged that the language was too remote, the immediate cause of the injury being the defective fence between the orchard and the road.

Wills Q.C., and *Mellor, Q.C.*, for the plaintiffs, were not called on.

Lord Cairns, C.—We have no doubt that the Court of Queen's Bench were right in their decision, and therefore we do not think it necessary to call upon the other side. [After stating the facts as set out in the case, his lordship proceeded:] The result appears to be as follows: there was negligence on the part of the company in allowing the trucks to come down the incline when the cattle were crossing. The final result of this was that the cattle were separated from the drovers; the next, that they became frightened and infuriated, and thus driven to do that which, under ordinary circumstances, they would not have done. Between the accident which caused the cattle to become separated from the drovers and that which caused their destruction, there was no material interruption; their separation from their drovers, their rushing up the road, breaking the fence, getting into the orchard and out of it again at the other end upon the railway was all one continuous action. Now it appears to me that it is no answer, under the circumstances, to say that the fence was imperfect. Suppose there had been no fence at all, the accident would have happened, and the same question of liability would have arisen; and it is not stated in the case that, if the drovers had been there, and the cattle had been proceeding along the road in the ordinary way, the fence would have been insufficient. It does not appear to me to afford any justification to the defendants to say that the fence was not in a proper state of repair as between landlord and tenant. For these reasons, I think that the judgment of the Court of Queen's Bench should be affirmed.

Lord Coleridge, C. J., Bramwell, B., and Brett, J., concurring.

Note.—The opinions delivered in this case in the Court of Queen's Bench are reported L. R. 9 Q. B. 263; 8 English Rep. 337; 1 Cent. L. J. 297.

Blackburn J., said:—"I am of the opinion that the rule must be made absolute. The facts seem to be that, by what is admitted to have been negligence on the part of the servants of the company, the cattle of the plaintiff, as they were crossing the railway on the level, were frightened and scattered, so that for a time the plaintiff's drovers lost control of all of them; they recovered the chief part of the cattle, but some were found killed on another railway. It happens that the cattle got on to the railway through a defect in the fence of a garden or an orchard belonging to the defendants: but from the nature of the accident, it seems to me that we may treat the case as if it had been the railway of some other company, or as if the cattle had fallen down an unguarded quarry. The question is, are the defendants, whose negligence drove the cattle out of the custody of the plaintiff, liable for their death, or is the damage too remote? No doubt the rule of our law is that the immediate cause, the *causa proxima*, and not the remote cause, is to be looked at, for, as Lord Bacon says: 'It were infinite for the law to judge the causes of causes and their impulsions one on another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree.' Bac. Max. Reg. 1. The rule is sometimes difficult to apply, but in a case like the present

*24 Weekly Reporter, 99.

this much is clear, that so long as the want of control over the cattle remains without any fault of the owner, the *causa proxima* is that which caused the escape, for the consequences of which he who caused it is responsible. Suppose, for instance, in former times a reclaimed falcon were frightened and escaped, the natural consequence would be that it would be lost altogether, and the person who negligently frightened it would be liable. The natural and proximate consequence was that it would not be got back at all. So, if you have lost control of cattle and cannot get them back under your control till they have run into danger and are killed, the death is a natural consequence of the negligence which caused you to lose control of them."

And in the course of his remarks in the same case, Quain, J., said: "Here the defendants' porters who were responsible for the proper management of the sidings and crossings, are the persons doing the illegal act, the consequence of which was the escape and death of the cattle. In a case of contract the question is very different. In tort the defendant is liable for all the consequences of his illegal act, where they are not so remote as to have no direct connection with the act, as the lapse of time, for instance. Applying that to the present case, I think the damage to the cattle not so remote from the injurious act as not to be the natural consequence of the act."

Voluntary Conveyances to Wife—When Federal Courts will follow State Courts.

LOYD v. FULTON, TRUSTEE.

Supreme Court of the United States, No. 108.—October Term, 1875.

1. Voluntary Conveyance to Wife.—A husband had received all his property, a large fortune, from his wife, and had at the time of the marriage made verbal promises to her father, and subsequently to her brother, that he would settle this property upon her, and at the end of thirteen years, being indebted at the time, he conveyed to a trustee for the wife less than half of his property and about one-third the amount he had received from her, reserving in his own name an ample amount for the payment of his debts. Afterwards, having engaged in a new business venture, he became involved; but his creditors delayed to challenge the validity of the trust deed until seven years after its execution. *Held*, under the circumstances, that the conveyance was honest and valid as against the creditors.

Argument 1. The modern and well established doctrine is that prior indebtedness is only presumptive, and not conclusive proof of fraud, and this presumption may be explained and rebutted. Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud there is no infirmity in the deed. Every case depends upon its circumstances and is to be carefully scrutinized; but the vital question is always the good faith of the transaction. There is no other test. This new rule is more consonant with right and justice and is founded in the better reason.

2. ——. Rules of Property—Where Federal Courts will follow State Courts.—A decision of the highest court of a state declaring the above rule becomes a rule of property in that state, and, in a case governed by the law of that state, the Supreme Court of the United States is as much bound to apply this rule as if it were a local court sitting in such state.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Mr. Justice SWAYNE delivered the opinion of the court.

All the testimony in this case was taken by the appellee. He was complainant in the suit. Only two witnesses were examined—himself and his brother-in-law, James S. Hamilton. There is no discrepancy in their statements. The facts lie within narrow limits.

Fulton the appellee, married Virginia F. Hamilton, the daughter of Thomas N. Hamilton, in the year 1851. Her father was a man of very large fortune; Fulton received by her, before and after her father's death, more than $100,000. He had himself at the time of his marriage substantially nothing. His father-in-law died intestate in 1859. Before and after his marriage, Fulton promised his father-in-law to settle his wife's fortune upon her. After his father-in-law's death, he made the same promise to her brother, James S. Hamilton, who administered upon his father's estate. Nothing in fulfillment of these promises was done by Fulton, until the 14th of September, 1864. On that day he executed to James S. Hamilton the deed made a part of the bill. It conveyed the premises in controversy in trust for the sole and separate use of the wife of the appellee and her children. The deed contained, among other things, a provision that if Hamilton should die, resign, or be removed from the trusteeship, she might appoint her husband, or any other fit person, as trustee in his place. On the same day Hamilton resigned, and Fulton was appointed. On the 16th of May, 1861, Fulton executed to James Loyd two notes of $5,000 each, one payable on the 1st of September following, the other payable on the 1st of September, 1862. There was due on these notes at the date of the trust deed, $11,780. Fulton then owed to other persons not exceeding $2,000. This was the extent of his indebtedness. The aggregate of his liabilities was less than $14,000. He retained in his hands property worth $36,000, besides non-enumerated articles worth $20,000 in Confederate currency. The point of depreciation which that currency had then reached is not shown. The property reserved was of greater value than that conveyed. After the execution of the deed, he was able to pay the notes. In 1862 he offered to pay them in Confederate currency, which was then but little depreciated. Payment in that medium was refused. His ability to pay continued until 1866. In that year he embarked in the enterprise of raising cotton in Arkansas. The result wrecked his fortune, and ruined him. He has since been unable to pay the notes. Suit was commenced against him upon the notes in February, 1868, and in May, 1871, judgment was recovered for $10,000 with interest, amounting to $6,447.81, and costs. Execution was issued and levied upon the trust property described in the bill. This suit was brought to enjoin the sale, and the circuit court decreed in favor of the complainant.

The provision of the English statute of frauds, touching promises made in consideration of marriage, is in force in Georgia. The promise of Fulton to Thomas N. Hamilton, before the marriage, was therefore, void. Brown's Stat. Frauds, pp. 220, 514. His promise after the marriage was without consideration, and, therefore, of no validity. The same remark applies to the like promise to James S. Hamilton, the administrator.

The principle of the wife's equity has no application to this case. Wicks v. Clarke, 3 Ed. Chy. Rep. 63. The trust deed was clearly a voluntary conveyance. Loyd was a prior creditor.

Was the deed good against him?

This question is the core of the controversy between the parties.

Formerly, according to the rule of English jurisprudence, such deeds, as against such creditors, were void. Townsend v. Windham, 2 Vesey, 10. The same principle was applied in such cases in this country. Read v. Livingston, 3 J. C. R. 481. It has been overruled in the English courts. Lush v. Wilkinson, 5 Vesey, 384; Townsend v. Westacott, 2 Beavan, 345; Gale v. Williamson, 8 M. & W. 410; Shares v. Rogers, 3 B. & A. 96; Freeman v. Pope, 5 Chy. App. Cases Eq. 544–5. It has been overruled by this court (Hind's Lessee v. Longworth, 11 Wheat. 213; Kehr v. Smith, 20 Wall. 35), and in most of the states of our Union. The state adjudications to this effect are too numerous to be cited. We shall refer to a few of them. Howe v. Ward, 4 Maine, 195; Moritz v. Hoffman, 35 Illinois, 553; Lerow v. Wilmarth, 9 Allen, 382; Miller v. Wilson, 15 Ohio, (O. S.) 108; Young v. White, 25 Miss. 146; Taylor v. Ewbank, 3 Marshall, 329; Salmon v. Bennett, 1 Conn. 525; Worthington v. Shipley, 5 Gill, 449; Townsend v. Maynard, 45 Penn. R. 199.

Such is also the law of the state whence this case came to this court. Weed v. Davis, 25 Georgia, 686. It is a rule of property there, and this court is, therefore, bound to apply it in the case in hand as if we were sitting as a local court in that state. 34 sec. Jud. Act of 1789; Olcott v. Bynum *et al.*, 17 Wall. 44.

The rule as now established is that prior indebtedness is only presumptive and not conclusive proof of fraud, and this presumption may be explained and rebutted. Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test.

Perhaps no more striking illustration can be found of the application of this principle and of the opposition its establishment encountered than is presented in the several cases of Van Wick v. Seward. On the 6th of November, 1817, Seward assigned a judgment to Van Wick and gave him a guaranty that it was collectible. The judgment was a lien upon lands fairly to be presumed more than sufficient to satisfy it. On the 16th of April, 1818, Seward conveyed all his real estate, consisting of a farm of two hundred acres, to his son. The consideration of the deed was the payment of a specified sum to each of two daughters of the grantor, and an annuity for life of $500 to the grantor himself, who was then aged and infirm. The lands bound by the lien of the judgment were sold under execution and bought in by Van Wick for a nominal sum. He thereupon sued Seward upon his guaranty and recovered a judgment which was docketed on the 13th of September, 1820. Van Wick thereupon sold under execution and bought in the farm which Seward had conveyed to his son, and brought an action of ejectment to recover possession. The jury found that there was no actual fraud. The supreme court, nevertheless, upon the ground that the liability was

prior to the deed, following the ruling of Chancellor Kent in Reed v. Livingston, gave judgment for the plaintiff's lessor. Jackson v. Seward, 5 Cow. 67. This judgment, upon grounds chiefly technical, was reversed by the Court of Errors of New York. Seward v. Jackson, 8 Cow. 423. Van Wick thereupon filed a bill in equity to avoid the deed. Chancellor Walworth concurred with the jury in the prior case as to the absence of fraud, and upon that ground, and the further ground of the circumstances of the sale of the property covered by the lien of the judgment, dismissed the bill. Van Wick v. Seward, 6 Paige, 63. The court of errors, upon appeal, affirmed this decree by a majority of one. The vote was fourteen to fifteen. Van Wick v. Seward, 18 Wend. 375. So ended the litigation. Perhaps in no case was the subject more elaborately explained This case was fatal to the old rule. We think the new one more consonant to right and justice and founded in the better reason.

In Miller v. Wilson, 15 Ohio O. S. 108, the doctrine of this case was expressly affirmed by the Supreme Court of Ohio, though the result upon the facts was in favor of the creditors. The facts of the case in hand are more favorable for the support of the deed than those in Van Wick v. Seward. Here the debtor reserved property worth more than twice and a half the amount of his debts. He expected and intended to pay all he owed. He continued able to do so until he lost his means by the hazards of business. The creditor rested supine for a long time. He did not take his judgment until more than eight years after the second note matured, and more than six years after the execution of the trust deed. More than seven years had elapsed when the levy was made. The validity of the deed was then challenged for the first time. The creditor quietly looked on until after misfortune had deprived the debtor of the ample means of payment which he had reserved, and now seeks to wrest from the wife the small remnant of property which her husband acquired by means derived wholly from her estate, and which, in part fulfillment of his promise repeatedly made both before and after his marriage, he endeavored to secure to her and her children.

The evidence, as it stands in the record, satisfies us of the honesty of the transaction on his part. The non-payment and the inability to pay are the results, not of fraud, but of accident and misfortune. When Fulton executed the deed he did what he then had the right to do, and was morally, though not legally, bound to do.

The proofs would not warrant us in holding that the settlement does not rest upon a basis of good faith, or that it is not free from the taint of any dishonest purpose.

The decree of the circuit court is affirmed.

Babcock's Case—Full Text of the Charge to the Jury.

UNITED STATES v. ORVILLE E. BABCOCK.

United States Circuit Court, Eastern District of Missouri, February 24, 1876.

Before Hon. JOHN F. DILLON, Circuit Judge, and Hon. SAMUEL TREAT, District Judge.

1. Conspiracy.—What is necessary in order to constitute a conspiracy; necessary to prove some one of the overt acts as charged. Guilty *knowledge* and participation necessary, but same may be proved by circumstantial evidence.

2. Circumstantial Evidence—Motive.—Necessity of showing motive, where the evidence is circumstantial.

3. The Testimony of Everest and Magill, as to the mailing, at the instance of Joyce, of an envelope to the defendant containing a $500 bill, and the subsequent withdrawing of it from the letter-box and the returning of it to Joyce, analyzed and its effect stated.

4. Ford's Successor.—The dispatches, correspondence, and testimony of the President with regard to the appointment of a successor to Collector Ford, grouped for the convenience of the jury, and the questions arising thereon stated.

5. Joyce's Trip to California.—The dispatches and correspondence which took place at the time of Joyce's trip to California grouped, and the respective theories of the prosecution and defence with reference thereto, stated.

6. The Projected Tour of Brooks and Hogue—Order Transferring Revenue Officers.—The dispatches and testimony relating to the contemplated visit of inspection by Brooks and Hogue to the Saint Louis distilleries. And also those in regard to the projected transfer of revenue officers, grouped for the convenience of the jury.

7. The Grimes Letters—Jury not to Raise Inference as to Contents of Letters, where Contents are not Proven.—After the indictment of McDonald, one of the conspirators, letters were sent to him by the defendant through Major Grimes. Neither the prosecution nor the defendant produced the letters, or proved their contents. *Held*, that the jury were not at liberty to conjecture what their contents were, but were to receive the fact as a circumstance that the defendant and this conspirator were in correspondence with each other about some matter undisclosed, and might consider the time when the correspondence took place and the manner in which it occurred.

8. Effect of Acts and Declarations of Conspirators.—The acts and declarations of conspirators are not of themselves evidence to connect a third person with the conspiracy; but if such third person is shown to have been a member of the conspiracy, then telegraphic dispatches of fellow conspirators, among themselves or to others, sent for the purpose of promoting the objects of the conspiracy, become evidence against him.

9. Testimony of Accomplices.—The credit to be given to the testimony of accomplices stated.

10. Credibility of Witnesses.—Some rules laid down for the guidance of the jury in determining the credibility of witnesses.

11. Evidence of Good Character.—The effect to be given to evidence of good character of the defendant stated.

12. Circumstantial Evidence.—In cases where the evidence tending to show guilt is wholly circumstantial, the following rules are laid down: 1. The hypothesis of delinquency or guilt of the offence charged in the indictment should flow naturally from the facts proved, and be consistent with them all. 2. The evidence must be such as to exclude every reasonable hypothesis but that of his guilt of the offence imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt *only*, but they must be inconsistent with his innocence. [People v. Bennett, 49 N. Y. 144.] If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires the jury to give the accused the benefit of the doubt, and to adopt the former. The burden of proof does not shift in criminal cases; it is on the prosecution throughout to establish the defendant's guilt by the evidence, and in criminal cases, the defendant not being permitted to testify, can not be called upon to explain or produce any proof until the prosecution, by the evidence it actually produces, establishes the defendant's guilt beyond a reasonable doubt.

13. The Doctrine of Reasonable Doubt.—The law clothes a person accused of crime with a presumption of innocence, which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt—*beyond a reasonable doubt*—which means that the evidence of his guilt as charged, must be clear, positive and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient, in a criminal case, to justify a verdict of guilty, that there may be strong suspicions or even strong probabilities of guilt, nor, as in civil cases, a preponderance of evidence in favor of the truth of the charge against the defendant; but what the law requires is proof, by legal and credible evidence, of such a nature tha [illegible] when it is all considered by the jury, giving to it its natural effect, they feel, when they have weighed and considered it all, a clear, undoubting and entirely satisfactory conviction of the defendant's guilt.

DILLON, J., charge the jury as follows:

GENTLEMEN OF THE JURY:—In preparing what I have to say to you, I am happy in having had the assistance of my brother Treat, and his concurrence in all the statements and propositions which follow:

Gentlemen, if it is a source of gratification to the court and counsel, that their respective labors in this case are drawing to a close, it must be doubly so to you, since, for more than two weeks, you have been restrained of your liberty, deprived of the society of family and friends, cut off from intercourse with the world, and not allowed to converse even among yourselves on that subject which has filled the minds of everybody else.

The court would willingly have relieved you of this constraint, but the great public interest the case has excited, and the pronounced course of many public journals respecting it—some prejudging it on the one side, and some on the other—and the many imperfect reports of the trial which have met our observation, made it not only proper, but necessary, in the interest of justice, that you should be removed beyond the reach of any popular feeling, however strong or subtle, whether favorable to the government or to the defendant; beyond the influence of the press, one of whose plainest public duties it is to abstain, pending a trial, from a course calculated to interfere with the due administration of justice; in a word, beyond any influence whatever except that to which the solemn oath you have taken confines you, namely, "the law and the evidence given you *in court*."

The constitutional guaranty of a trial by jury, upon legal evidence, under the supervision of the court, is designed to protect the innocent and punish the guilty, and this wise provision will be practically subverted if it be not seduously guarded from all improper influences; and this is especially necessary in cases which, for any reason, are attended with great public interest or feeling.

Gentlemen, it is justly due to the cheerful patience with which you have submitted to this long confinement, not less than to the attentive care you have given, day after day, to the coming in of the vast mass of testimony now before you for your consideration, that we should, before proceeding to give you directions as to the law of the case, thus publicly recognize and commend your course and conduct.

The court has had the benefit of all the suggestions and arguments which could be offered on the one side or the other by the eminent counsel in the case, touching the questions of law arising in it. Thus aided, our duties on the trial were made comparatively easy, and, fortunately, the duty that yet remains to us is plain; for there is no principle of law now belonging to the case which is controverted by counsel, or which has not been long settled by the courts of Great Britain and this country.

Our further duty is simply to state and define these rules of law, and to make such observations as will assist you in properly applying these rules to the case which the testimony presents for your decision.

The case against the defendant in one which mainly depends upon circumstantial evidence, and it is in such cases that counsel can be of great assistance to the jury in directing their attention to those circumstances which are considered material to their respective theories, and in commenting upon their force and effect. It has been your good fortune, gentlemen, to listen to arguments, both for the government and for the defendant, which have been marked in no common degree with clear statement, great ability and masterly analysis.

Declaring that you entered the jury-box wholly free from opinion or

bias, one way or the other; kept aloof pending the trial from any influence that could improperly affect you; aided by the argument of counsel, and by such instructions and advice as the court is able to give, you come to your deliberations with every circumstance which can conduce to the formation of sound conclusions, and the rendition of a true verdict, according to the law and evidence given you on the trial.

The two main questions presented for your consideration are:

1. Was there such a conspiracy as is described in the indictment, and was any one of the overt acts committed, as alleged, in furtherance of said conspiracy?

2. If such a conspiracy existed, was the defendant a member of it, or one of the conspirators?

As to the first of these questions you may, perhaps, have very little difficulty.

It is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly by *words* or *in writing*, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective.

It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators.

A combination formed by two or more persons to effect an unlawful end is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto, from that time, as if he had *originally* conspired.

The charge in the indictment is substantially that a conspiracy was formed to defraud the United States of the tax of seventy cents per proof gallon on distilled spirits to be produced thereafter in the distilleries named in the indictment. It is necessary, in order to prove the conspiracy as charged, to establish also that some one of the overt acts named was committed by the person alleged in the indictment to have been guilty of said overt act, and that he was one of the conspirators, doing the act to promote the unlawful scheme.

Upon the evidence in the case, and the concessions of counsel, you will, probably, have no doubt as to the existence of a conspiracy of enormous proportions between the distillers on the one hand and certain internal revenue officers on the other, formed and maintained in the city of St. Louis, whereby the government was systematically plundered for a long period of time, of revenue to a vast amount.

It was the duty of the government, on discovering this conspiracy, to crush it—to stamp it out of existence—and to bring the guilty to justice and deserved punishment.

But the government sustains a relation and owes a duty to its citizens as well as to its revenues, and its interests do not demand and will not be promoted by the conviction of any one who is not proved, in the manner required by the rules of law, to be guilty of the offense imputed to him; and so, gentlemen, you must come to a dispassionate consideration of this case, recollecting that the court, and the jury, as a part of the court, have but one duty to discharge, but one object to attain, and that is to ascertain the truth and to do justice with absolute impartiality and fearless independence.

It is well known that the attention of the country has been drawn to these frauds, and the occurrences which have taken place under your observation show the warm public interest in these trials.

We feel it to be our duty to say, that while the indignation of every right-minded citizen is justly excited against the real perpetrators of these frauds, the jury should be especially on their guard that this should not overmaster, or in any way, or in the least degree influence their judgment in deciding the great issue before them, and that is, whether the defendant was and is fully proved to have been a member of the conspiracy. But in proportion to the extent of the indignation, there may be the danger, if the jury are not seduously on their guard, of including in the list of the guilty, persons named in connection with these frauds but whose connection remains to be established in the manner and to the extent required by the law in all criminal cases.

It is just as much the duty of the jury to acquit the innocent as to convict those proved to be guilty.

Assuming that you will find the existence of the conspiracy between Joyce and the distillers and others, your inquiry will be narrowed to a single ultimate question of fact, namely, was the defendant one of the conspirators—a fellow conspirator with Joyce and the distillers named in the indictment? The government affirms it, and must prove it by legal and satisfactory evidence, in order to ask a verdict in its favor.

As the defendant is indicted for conspiracy with Joyce and the distillers named in the indictment, it is clear that the charge implies that the defendant *knew* there was such a conspiracy in the city of St. Louis, and with such knowedge knowingly aided the conspirators in their unlawful scheme; and this guilty knowledge and participation must be proved by the government. No witness has been introduced who has testified that the defendant was ever informed or knew of the conspiracy, or that he ever admitted his knowledge of it, or participation in it. No writing signed by the defendant has been produced which in direct or express terms shows such guilty knowledge and participation on his part. But the law does not require direct proof of these facts, but they may be proved by facts and circumstances which show them beyond a reasonable doubt.

Accordingly the prosecution relies upon certain facts and circumstances which it claims to have established by evidence which it furthermore claims not only justifies, but makes clear and positive the conclusion to be drawn therefrom, viz., that the defendant knew of the conspiracy, and knowingly aided the conspirators.

The case of the defendant is peculiar. He was not a distiller or rectifier. He was not in the internal revenue service as an officer or agent. The theory of the government is that he was sought out by Joyce and McDonald, leading conspirators, because of his residence in Washington, where the internal revenue bureau is located, and his supposed facilities to give information which would prevent the detection and discovery of the frauds, and otherwise to render services in aid of the conspiracy. This, it was claimed, is their motive, and no motive is ascribed by the counsel for the government as the inducement to the defendant to enter into this conspiracy, except for purposes of pecuniary gain to himself. In all cases, and especially in cases depending upon circumstantial evidence, an inquiry into the motives actuating the accused is always important, because human experience shows that men do not commit crime without motive therefor. To show the defendant's motive to be that of pecuniary gain, and to establish his knowledge of and guilty participation in the conspiracy, the prosecution relies mainly upon the testimony of Everest as to the mailing of an envelope by Joyce with $500 inclosed therein to the defendant, and upon certain telegraphic messages to and from the defendant, in connection with the cotemporaneous circumstances, and in connection with other dispatches sent to and from other alleged or confessed conspirators.

As different rules of law apply to these different classes of evidence, it is necessary to advert to them separately. You have heard the testimony of Everest and Magill with respect to the alleged deposit of two letters in a street letter-box and the removal of the same from the box by Mr. Magill at the instance of Joyce. If you believe both Magill and Everest, then the alleged transaction is so far satisfactorily explained as to show that the defendant did not receive the alleged envelope addressed to him. If you discredit the testimony of Magill, you should then bear in mind what Everest described as the details of Joyce's manipulation with respect to the $500 bills, and as to the deposit of the same, under the eyes of Joyce, in the letter-box, so as to ascertain satisfactorily to yourselves whether both or either of those bills was placed within the envelopes; also the fact that Everest is a confessed conspirator, and was at the time the collector for the ring, and that, as Bevis testifies, the distillers were then making very little illicit spirits because they knew their distilleries were being watched. These facts may be important so far as they show the acts and purposes of Joyce in that transaction, and what he really did and designed to have Everest understand he was doing. As will be hereafter more fully stated, the testimony of accomplices is to be received with extreme caution, and reliance upon it is always held to be dangerous if unsupported. Hence, it is just and proper that the jury should look outside of conspirators' testimony for corroboration. The evidence by Alexander that Everest obtained two $500 bills is corroborative of that fact, but not of Everest's testimony as to what was done with them by him and Joyce. Should the jury reach the conclusion, however, that Everest did place in the street letter-box an envelope addressed to the defendant, as alleged, and that said letter contained a $500 bill, and that it was not afterwards removed by Magill, still it is not a conclusive presumption of law, nor a legal presumption, that the defendant actually received it, but it is a fact to be considered by the jury in connection with the routine and usage of the postal service, and with other facts and circumstances, to enable them to determine satisfactorily to themselves whether the defendant did receive that letter and its contents, and whether the same was sent and received for a guilty purpose in connection with and in furtherance of the conspiracy, and the defendant knew from whom it came, and that it was sent for such guilty purpose or in connection with the conspiracy named in the indictment. Under the circumstances in the case it becomes one of your most important and delicate duties to determine the credit to be given to the testimony of the accomplice, Everest. He is the only witness who testifies to any fact tending to show the payment of money to the defendant by any of the conspirators. If you credit Magill, the testimony of Everest as to the money becomes unimportant against the defendant, and then important in his favor, as tending to show a design and purpose on the part of Joyce in promotion of his own schemes falsely to hold out to the conspirators here that the defendant was a member of the conspiracy; but if you do not credit the testimony of Magill, then you will have to determine what reliance, if any, taking all the circumstances together, you can safely place on the testimony of Everest, and what it really proves against the defendant, and what inferences of guilt you can safely draw therefrom. These are matters which the law commits to your sound judgment.

Drawing your conclusions on this subject, it will occur to you as obviously just to bear in mind that, according to Everest's evidence, no one but Joyce and himself knew of the transaction; that the defendant's mouth is sealed, so that he can not testify as to whether he did or did not receive the envelope with the inclosure, so that if the evidence is false, or if the alleged inclosure was never sent or never received by him, he is helpless to prove the negative. These are considerations to be weighed by you in forming a judgment as to whether it has been clearly and satisfactorily established to your minds that the defendant did receive the alleged $500 bill, and for the guilty purpose imputed

by the prosecution. As to the credibility of Magill, that is a question wholly for you to determine, guided by the general rule on that subject, hereinafter laid down, viz: as to the reasonableness of his statements, his relation to the case, and his manner and conduct on the witness stand, there being no testimony offered to impeach him.

It will thus be understood that on this branch of the case there are four questions for your careful consideration, viz:

1. What credit is due to the testimony of Everest?
2. If he is to be credited, what does his testimony show as to the use made of the $500 bills by Joyce in connection with the envelopes?
3. Whether any such bill was received by the defendant with the guilty knowledge imputed?
4. What credit is to be given to the testimony of Magill?

We now pass to another branch of the testimony.

Evidence has been given tending to show that the conspiracy in St. Louis between the distillers and rectifiers and internal revenue officers was in full existence and flagrant when Mr. Ford, Collector of Internal Revenue, died, October 23, 1873.

The first evidence in point of time relied on by the government to connect or tending to connect the defendant with this conspiracy is that which relates to the appointment of Mr. Ford's successor. It is claimed by the counsel for the government that the defendant, for guilty purposes and to advance the interests of the conspirators, sought to procure the appointment of Joyce or Maguire to that position. On the other hand, the counsel for the defendant claimed that the evidence shows that the defendant did not interfere with or seek to influence the appointment, and that there is nothing to show any improper agency of the defendant, or from which you can infer any unlawful purpose on the part of the defendant in this respect. To sustain this charge against the defendant, the government relies mainly upon the dispatches of Joyce to the defendant, below given, of date respectively October 25, October 27, and October 28, 1873, and particularly the latter, called the "Mum" dispatch. On the other hand, the defendant contends that, when these dispatches are read in connection with cotemporary dispatches and letters upon the same subject and the testimony of the President upon the appointment of Mr. Ford's successor, they fail to support the theory of the government as to the agency of the defendant or the unlawful purpose or motive alleged in respect to supplying that vacancy. This, you will perceive, gentlemen, thus becomes a question of fact for you to decide upon the whole testimony in the case relating thereto. The evidence on this point is embraced in the following dispatches and letter of Joyce to the defendant, and the deposition of the President, which we have arranged by days in chronological order, commencing October 25 and ending October 29, 1873. It does not appear in evidence whether the death of Ford was communicated to the President previously to October 25, 1873.

FORD-MAGUIRE DISPATCHES.

"St. Louis, October 25, 1873.—Gen. O. E. Babcock, Executive Mansion, Washington, D. C., care President Grant: Poor Ford is dead. McDonald is with his body. Let the President act cautiously on the successorship. "John A. Joyce."

"St. Louis, Mo., October 25, 1873.—To His Excellency U. S. Grant, Washington: Please see our dispatch of this day to Delano, and tell us how we, as securities of our friend C. W. Ford, can protect ourselves from any wrong action of his deputies. "Wm. H. Benton,
"John M. Krum,
"Wm. McKee."

This is all that bear date October 25; the next are dated October 27.

"St. Louis, October 27, 1873.—His Excellency U. S. Grant: If you received telegram from us please answer. "John M. Krum,
"Wm. H. Benton,
"Wm. McKee."

"Washington, October 27, 1873.—John A. Joyce, St. Louis, Mo.: See that Ford's bondsmen recommend you. B."
(Babcock.)

"St. Louis October 27, 1873.—To Gen. O. E. Babcock, Executive Mansion, Washington, D. C., care President Grant: The bondsmen prefer the man they have recommended. An expression of the President to his friends here will secure everything. Let the President do for the best, depending upon McDonald and myself to stand by his action to the last. Answer. "John A. Joyce."

"St. Louis, October 27, 1873.—President U. S. Grant, Washington, D. C.: It would be gratifying to your friends and the republicans of our city if Constantine Maguire could be appointed collector of revenue of the district. He is on Mr. Ford's bond, has the confidence of Mr. Ford's friends, and is really an honest straightforward man, as well as capable. "Henry T. Blow."

"St. Louis, October 27, 1873.—To President U. S. Grant, Washington: As your personal and political friends we urgently request the appointment of Constantine Maguire as successor to our friend, the late C. W. Ford. "Wm. H. Benton,
"Wm. McKee,
"John M. Krum."

On this subject the President testified as follows:

Q. [Handing witness a copy of telegram.] I wish you would state what you know in relation to that? A. This dispatch seems to be dated "Washington, October 27, 1873.—To Wm. H. Benton, Wm. McKee and John M. Krum: Your request in regard to col'ectorship will be complied with. (Signed), U. S. Grant." Those gentlemen were part of the bondsmen of Ford, and they had recommended Constantine Maguire for Ford's place as collector.

Q. The original of that I believe is in your handwriting? A. Yes, I wrote that myself. I saw the original this morning.

The above are all the dispatches of October 27. On the next day are the following:

"St. Louis, October 28, 1873.—To the President: We have the honor to recommend Col. Constantine Maguire for Collector of Internal Revenue, First District Missouri. (Signed.) "John A. Joyce,
"C. A. Newcomb,
"Jno. McDonald,
"Wm. Patrick."

"St. Louis, October 28, 1873.—Gen. O. E. Babcock, Washington: See dispatches sent to President; we mean it; mum.
"John A. Joyce."

Letter of Joyce to the defendant:

"St. Louis, October 29, 1873.—Dear General: I heard from you in due course in regard to the collectorship, and went at once to 'see the bondsmen,' but found they were fixed on the man they had recommended, and not being in a position to induce them to act in my behalf, telegraphed as I have already done.

"Of course the telegrams to parties here revolving in and about the *Globe* office got out among the particular friends, and therefore the newspaper hawks got just enough of the action already had to spread themselves and tell more than anybody else knew. I am sure if the President acts upon the recommendation of the bondsmen and what has been sent from the officers, the interest of the government will be secure, and the public generally will be satisfied.

"Words are not sufficient to convey to yourself and the President the pride I feel for the confidence thus far displayed in me in connection with the vacancy. I shall endeavor, in my future actions, to meet the good wishes of the President, and you will please convey to him my most hearty thanks for his kindness and confidence. Now that poor Ford is dead and gone I can tell you truly that there are few men on earth that can fill his place.

"I would like to telegraph and write you more confidentially; but as the interests of the government will be fully protected in your hands, I will say nothing further on the collectorship at present.

"The resolutions passed at a public meeting in honor of Ford's memory, I have already engrossed on parchment paper, and will forward to his sister and the President in a few days.

"I am, under all circumstances, your friend, etc.,
(Signed) John A. Joyce.
"Gen. O. E. Babcock, Washington, D. C.
"P. S.—Gen. McDonald sends kindest regards."

FORD'S SUCCESSOR.

On the subject of the appointment of a successor of Mr. Ford, the President, whose deposition was taken on behalf of the defendant and read in evidence, testifies as follows:

Q. State, please, what, if any, applications were made at the time of his decease as to the appointment of his successor. A. It is impossible for me to remember all the applications that were made for the place. I do recollect, however, that Gen. Babcock brought me a dispatch addressed to him by John A. Joyce, in which the latter practically applied for the position.

Q. What other, if any, applications were made as to the appointment of a successor? But first let me enquire if you have the dispatch to which you have just made reference? A. I do not know.

Q. Do you know where it is? A. I do not, but presume it could be found. I think it very likely that it is in possession of Gen. Babcock's counsel or of the district attorney.

Q. Were there any requests or communications with regard to the appointment of Mr. Ford's successor from his sureties? A. When Gen. Babcock exhibited to me the dispatch from Mr. Joyce, I said to him that as Mr. Ford died away from home, and very suddenly, I would, in the selection of a successor, be to a great extent guided by the recommendation and wishes of his bondsmen. I thought they were at least entitled to be heard respecting the person to be selected, and upon whom would devolve the settlement of the affairs of the office.

Q. What did you do with reference to the appointment, and to whom, if anyone, did you decide to leave the nomination of Mr. Ford's successor? A. That information is embraced in the answer just given.

Q. Whom did the bondsmen actually recommend? A. Constantine Maguire.

Q. And on their recommendation exclusively he received the appointment? A. I could not say exclusively, because he was well recommended and was satisfactory to the bondsmen of Mr. Ford.

Q. Did Gen. Babcock ever, in any way, directly or indirectly, urge, or request, or seek to influence the appointment of Mr. Maguire, or did he ever exchange a word with you upon the subject which indicated that he desired his appointment? A. I do not think he ever did; nor do I believe that he was aware of the existence of Constantine Maguire prior to his recommendation as the successor of Mr. Ford.

Q. Did you inform Gen. Babcock that you intended to leave the naming of Mr. Ford's successor to his bondsmen? Did you resquest him so to notify the parties? A. The question has, I think, already been answered.

Q. It embraces perhaps this addition: Did you request him to notify the parties? A. I do not remember.

On his cross-examination, the President, in answer to questions by the counsel for the government, testified on the subject, as follows:

Q. Do you remember whether John A. Joyce was recommended to you as Ford's successor, by General Babcock? A. He was not.

Q. Was anything said to you by General Babcock, between the time of the death of Ford and the appointment of Constantine Maguire, touching Joyce's fitness for the place? A. General Babcock presented

me a dispatch that he had received from Joyce, saying that he was an applicant, or making application for it; I do not remember the words of it; the substance of it was that he wanted to be Ford's successor; my reply to him was, that I should be guided largely in selecting the successor of Mr. Ford, by the recommendation of his bondsmen; he having died suddenly, unexpectedly, and away from home, I thought they were entitled to be at least consulted as to the successor who should settle up his accounts.

Q. Did you advise Gen. Babcock to telegraph to Joyce to get the bondsmen of Ford to recommend Joyce for collector? A. I made the statement, in substance, that I have given in answer to a former question; whether I told him to so telegraph or not, it would be impossible for me to say; that might be regarded as at least authority to so telegraph.

Q. Did you see any telegram of that character from Babcock to Joyce at that time? A. I do not remember to have seen any.

Q. Did Gen. Babcock at that time show you a dispatch from Joyce in these words: "St. Louis, October 28, 1873.—See dispatch to the President. We mean it. 'Mum.' (Signed.) Joyce"? A. I do not think that my memory goes back to that time; since these prosecutions have commenced I have seen that.

Q. I am asking you in regard to that time? A. I do not recall it to memory.

Q. Did you receive a protest against the appointment of Constantine Maguire, signed by James G. Yeatman, Robert Campbell and others? A. I do not remember such a letter. If such a one was received, it is, no doubt, on file in the treasury department. Such a protest may have been received.

Q. Your purpose in leaving the nomination of Mr. Ford's successor to his bondsmen was because they were liable on his bond for the administration of his office, was it not? A. Yes, sir. Further than that, some of them were men that I knew very well and had great confidence in.

Unless we have overlooked something, this constitutes all the evidence produced on both sides upon the subject of the appointment of Mr. Ford's successor. If we have omitted anything which the counsel on either side think material, they have leave to call it to our attention at this time, or the omission may be supplied by the jury. Upon this testimony two questions of fact concerning it arise for the decision of the jury. 1. Whether the defendant did, in point of fact, seek to influence the appointment of Mr. Ford's successor. 2. If so, whether he did this for the unlawful purpose alleged, that is, knowing that there was in existence such a conspiracy as is charged in the indictment, and thus knowing it, sought to exert such influence to aid and promote the illegal purpose of Joyce or the other conspirators in this city.

JOYCE'S TRIP TO CALIFORNIA.

The next class of dispatches relate to the order for Joyce to visit California, and are as follows:

"WASHINGTON, March 7, 1874.—John A. Joyce, Revenue Agent, St. Louis, Mo: I need an agent to make investigations at San Francisco, in place of Sewell, confirmed as Supervisor and ordered home. Can you go for me, say for two months?

J. W. DOUGLASS, Commissioner."

"St. Louis, March 8, 1874.—Hon. J. W. Douglass, Commissioner Internal Revenue, Washington, D. C.: Shall be pleased to serve the Honorable Commissioner at San Francisco, or any other place where my work can benefit the government. Before starting to California would like to consult you and receive instructions.

JOHN A. JOYCE, Revenue Agent."

WASHINGTON, March 9, 1874.—John A. Joyce, Revenue Agent, St. Louis, Mo.: Not necessary to come here. Will write you full instructions care of the Supervisor of San Francisco.

J. W. DOUGLASS, Commissioner.

On the same day, March 9th, the Commissioner telegraphed leave to Hogue to go out of his district to follow up a case of fraud, and a night telegram from Washington, not from the defendant, but over the signature of "Mack," was sent to Joyce at St. Louis, stating that "if sickness of your family prevents your going West, R. A. Hogue may pay you a visit.

Following that telegram were these, viz:

ST. LOUIS, March 10, 1874.—Hon. J. W. Douglass, Commissioner Internal Revenue, Washington, D. C.: When will my instructions to go to California be here? JOHN A. JOYCE, Revenue Agent.

WASHINGTON, March 10, 1874.—John A. Joyce, Revenue Agent, St. Louis, Mo.: Full instructions will be mailed to San Francisco.

J. W. DOUGLASS, Commissioner.

WASHINGTON, March 11, 1874.—H. Brownlee, Revenue Agent, Newcastle, Ind.: You have permission to follow evidences of fraud out of your district. J. W. DOUGLASS, Commissioner.

MARCH 11, 1874.—Col. John A. Joyce, Revenue Agent, St. Louis, Mo.: Did you receive Mack's telegram? Your friends will doubtless make you a visit. WM. O. AVERY.

ST. LOUIS, March 11, 1874.—Col. Wm. O. Avery, Internal Revenue Office, Washington, D. C.: Telegrams received. Start for San Francisco Sunday night. All perfect here. JOYCE.

ST. LOUIS, March 14, 1874.—Gen. O. E. Babcock, Executive Mansion, Washington, D. C.—Start for San Francisco to-morrow night. Make D. call off his scandal-hounds, that only blacken the memory of F. and friends. Business. J.

This was written and sent by Joyce; only one, and that the last of this series, was addressed to the defendant. To it he wrote this answer by mail:

WASHINGTON, D. C., March 17, 1874.—Dear Joyce: I received your telegram just before you left. I have seen D., and he assures me no mention has ever been made of Ford's name in the matter of a brewery, and he says there are no charges against any official out there, that it is against a brewery. I do not know your instructions or trip to San Francisco. I think, though, that it is because D. trusts you to do important work. I hope you will have a pleasant trip, and a successful. Nothing new here. All well. Yours truly, etc., etc.

O. E. BABCOCK.

To Col. J. A. Joyce, Girard Hotel, San Francisco, California.

In this connection the jury should bear in mind that Douglass testifies that the defendant visited the former to enquire if there were any charges in his (the commissioner's office) against Ford, and that the commissioner said there was none; also the relations which Ford bore in his lifetime to the President, as specially shown by the latter in his deposition. And also Douglass' testimony to the effect that the defendant did not, in any way, seek to prevent investigations into frauds on the revenue, and the reasons given for sending Joyce to California.

The prosecution claims that the purpose of Joyce in appealing to the defendant under pretense of protecting the memory of Ford, was merely to prevent investigations into frauds in St. Louis during his (Joyce's) absence in California, and that the defendant knew of Joyce's guilty purpose, and sought to aid therein.

On the other hand, the counsel for the defendant insist that the testimony distinctly proves that whatever may have been Joyce's purpose, the defendant merely enquired, as Douglass testifies, whether there were any charges against Ford, and denies explicitly that anything was asked as to proposed investigations in the St. Louis district. What defendant did on receiving the dispatch from Joyce, depends largely, if not entirely, on the testimony of Douglass, just referred to. It is not here rehearsed in detail, but if the jury are in doubt as to the statements of Douglass on this point, an official copy of his evidence will be furnished to you.

JOYCE'S VISIT TO WASHINGTON—TELEGRAMS.

It appears that Joyce proceeded to California pursuant to the orders of the commissioner, and returned by leave in June, 1874, and, at his own request, visited Washington as early as July 1, 1874. While in Washington, the following dispatches passed between him and McDonald:

"WASHINGTON, July 1, 1874.—John McDonald, St. Louis: Things look all right here. Let the machine go. JOYCE."

"WASHINGTON, July 3, 1874.—John McDonald: Matters are hunkey. Go it lively and watch sharply. JOYCE."

"WASHINGTON, July 17, 1874.—John McDonald, St. Louis: Am here on my return. What can I do for our side? JOYCE."

"ST. LOUIS, July 18, 1874.—John A. Joyce, Washington: See Maguire's letter to commissioner concerning Busby's house, sure.

JOHN MCDONALD."

THE PROJECTED TOUR OF BROOKS AND HOGUE.

The next group of telegrams is supposed to relate to the projected visit of Brooks and Hogue to St. Louis. Rogers, the deputy commissioner, testifies that the plan to send them to St. Louis was formed in August, 1874. You have heard what was done in respect thereto, the frequent postponements that occurred and the reasons given therefor.

In this connection your attention is directed to the following:

ST. LOUIS, August 5, 1874.—Col. Wm. O. Avery, Treasury Department, Washington, D. C.: Have friends started West again? Find out—let me know. A.

This telegram was in the handwriting of Joyce, and was a night dispatch.

CINCINNATI, O., August 6, 1874.—J. W. Douglass, Commissioner Internal Revenue, Washington, D. C.: I have just received important information showing extensive frauds in St. Louis in '71 and '72. If one W. A. Woodward applies for special commission to attend to this matter, it is not necessary. I have the same information he has, and more conclusive. Send Brooks, and we can bring all out that is in this matter. Answer. HOGUE, Revenue Agent.

From the evidence as to Hogue's conduct from early in 1874 to the close of the alleged conspiracy, the jury may be able to determine the force and significance of the telegrams just read, as also that from Joyce to Avery, dated August 5, a night dispatch.

ST. LOUIS, August 26, 1874.—Col. Wm. O. Avery, Chief Clerk Treasury department, Washington, D. C.: Are friends coming West? See H. and give me soundings.

This is in Joyce's handwriting. Whether "H." referred to Hogue or some other person is not directly shown in evidence.

This was also a night dispatch:

WASHINGTON, October 17, 1874.—John A. Joyce, St. Louis, Mo.: Your friend is in New York and may come to see you. AVERY.

According to Brooks' testimony, he (Brooks) had been in Washington with reference to the projected visit to St. Louis, and was in New York under orders of the Commissioner on October 17, 1874.

ST. LOUIS, October 18, 1874.—Col. Wm. O. Avery, Treasury Department, Washington, D. C.: Give me something positive on movements of friend; act surely, prompt. A.

This was a night dispatch from Joyce.

ST. LOUIS, October 25, 1874.—Gen. O. E. Babcock, Executive Mansion, Washington, D. C.: Have you talked with D.? Are things right? How? J.

This was a night dispatch from Joyce, and was not answered, nor does it appear so far as we can see, from Mr. Douglass' testimony, that it was

ever acted on. If our memory is at fault in this respect, you will correct the omission.

Pursuant to telegraphic orders from Washington, Hogue was to be in St. Louis November 13. From the testimony it seems that he arrived here on November 12, and remained to the 19th, but did not put his name on the hotel register until the 19th—the day he left.

On November 23, Hogue was ordered to report at Washington in person at once, the telegraphic order having been directed to Xenia, O. On November 26 he telegraphed that he was detained by sickness in his family, and would report on the 1st of December following. He reached Washington on December 3, and Brooks was summoned on that day to Washington to meet Hogue.

Joyce sent a night dispatch as follows:

"ST. LOUIS, December 3, 1874.—Gen. O. E. Babcock, Executive Mansion, Washington, D. C.: Has Secretary or Commissioner ordered anybody here? J."

This was not answered.

As Brooks could not go to Washington on December 3, Hogue went to Philadelphia to meet him, and on December 7 both went to Washington, where Brooks remained until noon of December 8. On November 24, Brooks had written this letter:

"UNITED STATES SECRET SERVICE, 56 BLEECKER STREET, NEW YORK, November 21, 1874.—To H. C. Rogers, Deputy Commissioner, Washington, D. C.—My Dear Sir: I am summoned in the United States Court at Philadelphia, on Monday, the 23d. The cases will probably be disposed of on that day, so that I can be at Washington on Tuesday. If possible, please have Mr. Hogue there by that time, and may I ask that any western case you think we can work, shall be put in such a state as we can take charge of it, and so make the trip profitable to the department, and satisfactory to ourselves. Very respectfully,

JAS. J. BROOKS, Special Agent."

On December 7, the same day that Brooks and Hogue arrived at Washington from Philadelphia, McDonald also arrived there. On the 8th he informed Rogers that he knew that revenue agents had been ordered to St. Louis, and protested against such action.

Whilst then in Washington, he sent the following telegrams:

WASHINGTON, D. C., December 7, 1874.—Col. John A. Joyce, Planters' House, St. Louis, Mo.: Had long ride with the President this afternood. B. and H. are here. You will hear from me to-morrow. JOHN."

"CORRIDOR HOUSE OF REPRESENTATIVES, December 8, 1874.—John A. Joyce, Planters' House, St. Louis, Mo.: Dead dog; goose hangs altitudelum; the sun shines. JOHN."

DECEMBER 9, 1874.—Col. John A. Joyce, Planters' House, St. Louis, Mo.: I leave to-night for New York—stop at Windsor House; will telegraph you from there. JOHN.

On or about December 10, 1874, the defendant had an interview with Commissioner Douglass, and showed to him a copy of Brooks' letter to Rogers, dated November 21, 1874, the original of which Rogers said had been taken surreptitiously from his desk by some one unknown to him. It is admitted that the defendant did not abstract that letter from Rogers' office; he urged on Douglass that the phraseology of the letter indicated blackmailing purposes, and suggested the employment of a superior class of persons for the intended work; the conversation on that subject as detailed by Mr. Douglass, must be fresh in your memory.

The President in his deposition, states, concerning that matter, as follows;

Q. Did Gen. Babcock, so far as you know, ever seek in any way to influence your action with reference to any charges made, or proposed to be made against Joyce or McDonald? A. I do not remember of his ever speaking to me upon the subject; he took no lively interest in the matter, or I should have recollected it.

Q. Did Gen. Babcock, so far as you know, ever seek in any way to influence your action in reference to any investigation of the alleged whiskey frauds in St. Louis or elsewhere? A. He did not. I will state at this point, that I do not remember but one instance where he talked with me on the subject of these investigations, excepting since his indictment. It was then simply to say to me that he had asked Mr. Douglass why it was his department treated all their officers as though they were dishonest persons, who required to be watched by spies, and why he could not make inspections similar to those which prevailed in the army, selecting for the purpose men of character who could enter the distilleries, examine the books and make reports which could be relied upon as correct. Gen. Babcock simply told me that he had said as much to Mr. Douglass.

Q. Do you remember the circumstances of John McDonald being in the city of Washington on the 7th day of February, 1874? A. I do not remember the particular date; I remember the time in question.

Q. Did you ride with him (McDonald) on or about that date or occasion, and was anything whatever said by him to you with reference to the investigation of alleged frauds in that district? A. I picked him up on the sidewalk as I was taking a drive, and invited him to go with me; I have no recollection of any word or words on any matter touching his official position or business.

Q. If I understand correctly the answer, Gen. Babcock's conception was, that in making this investigation it would be wiser to have it done by men of superior character than by men of inferior and suspicious character? A. Yes, sir.

Q. Did Gen. Babcock, at or about that time, say anything to you with reference to such investigations, and, to your knowledge, did he in any way undertake to prevent them? A. I have no recollection of his saying anything about that. Certainly he did not intercede with me to prevent them.

On the cross-examination the President said:

Q. Do you remember that Gen. Babcock, prior to May, 1875, talked with you about the propriety of sending detectives into the several districts to detect frauds? A. I do not. I remember of his telling me at one time of what he had proposed to Mr. Douglass, but the date of it I do not remember. And that was not a suggestion to me; it was merely telling me what he had suggested to Mr. Douglass, and this is the same that I have before stated.

Q. Did you have any conversation with Gen. Babcock prior to May, 1875, in reference to a letter written by J. J. Brooks to Deputy Commissioner Rogers? A. I do not remember dates, but I remember of his showing me a letter that had been handed to him from somebody in Philadelphia to Mr. Rogers, and he said that that appeared to his judgment to be simply blackmailing; and I think that was the occasion when he told me what he had said to Mr. Douglass, that is, as I remember now.

Q. Do you remember when that conversation was? A. No. I do not. My recollection is that he had shown that letter to Mr. Douglas before he did to me, and that was the occasion when he told me of this suggestion.

On December 13, 1874, the defendant and Douglass had a conversation in Washington, while walking, in the course of which Douglass informed the defendant, that the proposed visit of Brooks and Hogue to St. Louis was "off." The following night dispatch was sent by the defendant:

WASHINGTON, D. C., December 13, 1874.—Gen. John A. McDonald, St. Louis, Mo.: I succeeded. They will not go. I will write you. SYLPH.

We have thus endeavored to recall the more important portions of the testimony with reference to this branch of the case; your memory will supply the minor details.

The theories, both of the government and of the defendant with respect thereto, have been so fully and elaborately discussed as to require no special comment from the court in this immediate connection.

TRANSFER OF REVENUE OFFICALS.

As to the order transferring supervisors and the suspension of that order:

Passing to another part of the case, it appears from the testimony of Douglass, Tutton and the President, that an order was issued about January 27, 1875, transferring supervisors and revenue agents from one district to another, in the supposed interests of the revenue service, and for the detection and prevention of frauds. Mr. Douglass and Mr. Rogers have stated the conversation defendant had with them respectively on the subject, and concerning the alleged impolicy, and the reasons assigned by them in support of his views. The prosecution claims that he actively interfered to cause the suspension of that order for the guilty purpose of aiding the conspiracy in St. Louis.

Mr. Douglass testifies that letters for the various transfers were mailed January 27, 1875.

On February 3, the following telegrams were sent and received:

ST. LOUIS, Mo., February 23, 1875.—Hon. J. W. Douglass, Internal Revenue Office, Washington, D. C.: Don't like the order. It will damage the government and injure the administration. Will explain when I see you. JOHN MCDONALD.

WASHINGTON, D. C., February 3, 1875.—John McDonald, Supervisor, St. Louis, Mo.: The order of transfer is general and only temporary. J. W. Douglass, Commissioner.

"ST. LOUIS, February 3, 1875.—Gen. O. E. Babcock, Executive Mansion, Washington, D. C.; We have official information that the enemy weakens. Push things. SYLPH."

This was written by Joyce, and was a night dispatch and unanswered.

"WASHINGTON, February 4, 1875.—Gen. John McDonald, Supervisor, St. Louis, Mo.: The order transferring you to Philadelphia is suspended until further orders. J. W. DOUGLASS, Commissioner."

"WASHINGTON, February 5, 1875.—John A. Joyce, Revenue Agent, St. Louis, Mo.: The order directing you to report to Supervisor McDonald, at Philadelphia, on the 15th, is suspended.

J. W. DOUGLASS, Commissioner."

Joyce seems to have been in Washington at that time, and several telegrams subsequently passed between him and McDonald, as follows:

ST. LOUIS, February 5, 1875.—To Col. John A. Joyce, Ebbitt House, Washington: Order to transfer to Philadelphia is suspended.

JOHN MCDONALD, Supervisor of Internal Revenue.

WASHINGTON, February 6, 1875.—To Gen. John McDonald, Planters' House, St. Louis, Mo.: Order busted forever. D. & Co. mad. Hold things level. KEARNEY.

(This was written by Joyce.)

WASHINGTON, February 10, 1875.—Gen. John McDonald, Supervisor of Internal Revenue, St. Louis, Mo.: Start home to-night. Things look lovely. Watch and wait. JOHN.

It is admitted that this was also written by Joyce. These dispatches indicate that Joyce left St. Louis for Washington on the 4th of February, and did not leave Washington for St. Louis before the 10th:

WASHINGTON, D. C., March 1, 1875.—General John McDonald, Superintendent Internal Revenue, St. Louis, Mo.: Letter received; have seen the gentleman, and he seems friendly; is looking after improvements of the river. O. E. BABCOCK.

You have heard from Commissioner Douglass, Revenue Agent Tutton and the President, their respective statements concerning the suspension of the order for the transfer of supervisors and revenue agents. Mr. Tutton stated his interview, first with the commissioner and next with the secretary of the treasury, to whom he presented his reasons for advising a suspension of that order. He stated as the result of his conversation with the secretary that the latter acquiesced in the propriety of

his suggestions, and requested him to call on the President and present the subject to him. He testified that he did as thus requested, and gave at considerable length what he said to the President in favor of suspending the order. He stated that his interviews with the secretary and President were on February 3, and within about two hours of each other: and before leaving the President the latter announced that he should at once cause the order to be suspended. The following is the order:

EXECUTIVE MANSION, WASHINGTON, February 4, 1875.—Sir: The President directs me to say that he desires that the circular order transferring supervisors of internal revenue be suspended by telegraph until further orders. (Signed.) LEVY P. LUCKEY.

The following is what the President testifies to on that point:

Q. Do you recollect the circumstances attending the promulgation of an order transferring the various supervisors from their own to other districts? A. I do.

Q. State fully with whom the idea upon which that order was based originated, and the particular reasons which induced you to direct it to be so? A. Sometimes, when Mr. Richardson was secretary, I think, at all events, before Secretary Bristow became the head of the department, Mr. Douglass, in talking with me, expressed the idea that it would be a good plan occasionally to shift the various supervisors from one district to another. I expressed myself favorably toward it, but it was not done then; nor was it thought of any more by me until it became evident that the treasury was being defrauded of a portion of the revenue that it should receive from the distillation of spirits in the West. Secretary Bristow at that time called on me, and made a general statement of his suspicions, when I suggested to him this idea. On that suggestion, the order making these transfers of supervisors was made. At that time I did not understand that there was any suspicion at all of the officials, but that each official had his own way of transacting his business. These distillers, having so much pecuniary interest in deceiving the officials, learn their ways and know how to avoid them. My idea was, that by putting in new supervisors, acquainted with their duties, over them, they would run across and detect their crooked ways. This was the view I had, and explains the reason why I suggested the change.

Q. Can you state whether Mr. Douglass, at that time commissioner of internal revenue, was aware of the fact that you suggested or made the order? A. I do not know that he knew anything about it.

Q. After the order had been finally issued, were any efforts made to induce you to order its revocation or suspension? A. Yes, sir; most strenuous efforts.

Q. Were such efforts made by prominent public men? A. They were.

Q. Did you resist the pressure which was made upon you for the revocation or suspension of the order; and if you finally decided to direct the revocation of the order, will you please state why you were induced to do so, and by whom? A. I resisted all efforts to have the order revoked, until I became convinced that it should be revoked or suspended in the interests of detecting frauds that had already been committed. In the conversation with Supervisor Tutton, he said to me that if the object of that order was to detect frauds that had already been committed, he thought it would not be accomplished. He remarked that this order was to go into effect on the 15th of February. This conversaion occurred late in January, and he alleged that it would give the distillers who had been defrauding the treasury three weeks' notice to get their houses in order, and be prepared to receive the new supervisor. That he himself would probably go in a district where frauds had been committed, and he would find everything in good order, and he would be compelled so to report. That the order would probably result in stopping the frauds at least for a time, but would not lead to the detection of those that had been already been committed. He said that if the order was revoked, it would be regarded as a triumph for those who had been defrauding the treasury. It would throw them off their guard, and we could send special agents of the treasury to the suspected distilleries—send good men, such a one as he mentioned, Mr. Brooks. They could go out and would not be known to the distillers, and, before they could be aware of it, the latter's frauds could be detected. The proofs would be all complete, the distilleries could be seized and their owners prosecuted. I was so convinced that his argument was sound, and that it was in the interest of the detection and punishment of fraud that this order should be suspended, that I then told him that I would suspend it immediately, and I did so without any further consultation with any one. My recollection is, that I wrote the direction for the suspension of the order on a card, in pencil, certainly before leaving my office that afternoon, and that order was issued and sent to the treasury, signed by one of my secretaries.

Q. Did Gen. Babcock ever, in any way, directly or indirectly, seek to influence your action in reference to that order? A. I do not remember his ever speaking to me about it or exhibiting any interest in the matter.

Q. From anything he ever said or did, do you know whether he desired that the order should be revoked or amended? A. That question, I think, has been fully answered.

Q. You have said that you resisted the pressure brought to bear upon you by prominent men, in regard to the suspension or revocation of the order transferring supervisors. If you have no objection, will you please state the names of those prominent men who brought that pressure to bear against you? A. There were many persons, and I think I could give the names of several senators, and probably other members of Congress; but probably I should have to refer to papers that are on file; I do not know that it is material; I know that the pressure was continual from the supervisors and their friends.

Q. Can you from memory name any senator or representative? A. I could name two or three, but I do not believe it is necessary.

CORRESPONDENCE WITH MAJ. GRIMES, ETC.

The prosecution has also offered the testimony of Maj. Grimes to show that the defendant sent under cover to him (Maj. Grimes) three letters to McDonald, after the latter had been indicted. Neither the prosecution nor the defense has produced said letters or shown their contents.

The jury, in cases of this kind, are not at liberty, under the rules prescribed by law, to conjecture what their contents were, but are to receive that fact as a circumstance indicating that the parties thereto were in correspondence with each other on some subject undisclosed, and [to consider] the time when said correspondence took place, and the manner in which it occurred.

The defendant has produced several letters from Joyce to himself, for the purpose of explaining the nature of their correspondence with each other.

He has also shown by the testimony of the President and of many other witnesses that the duties of his office made him a kind of intermediary between the President and those having business with the latter or the several departments at Washington. These facts it is for you to consider in reaching a conclusion. They may serve to explain what otherwise might appear obscure, and hence are important in any aspect which you may view the evidence in regard to the respective theories advanced.

DECLARATIONS AND DISPATCHES—LEGAL RULES.

Various classes of dispatches, as you will have perceived, have been laid before you—some to the defendant and some from him; some between confessed conspirators, not referring to the defendant, and unaccompanied by proof that he knew of them; and other dispatches between revenue officers and agents of the government. The dispatches between other persons than the defendant are no evidence to show his connection with the conspiracy unless they are brought home to him. They were admitted to show the nature and purpose, the plan and operations of the conspiracy.

Guilt cannot be fastened upon any person by the declaration or statements, oral or written, of others. Guilt must originate within a man's own heart, and it must be established by his own acts, conduct or admissions. Hence, in determining the question of the defendant's guilt, so far as it is sought to be shown by the dispatches, primary reference must be had to the dispatches to and from the defendant, and especially such dispatches as he is shown to have answered or acted on.

If the dispatches to and from the defendant, in connection with the other facts and circumstances in the case, show that he knew of the alleged conspiracy, and that he was a guilty participator therein, then the dispatches of his fellow-conspirators among themselves, or to others, sent for the purpose of promoting the conspiracy, become evidence against the defendant, but not otherwise. What weight, if any, is to be given to the dispatches which are not shown to have been acted upon by the defendant, must depend, among other considerations, upon whether an answer was called for or not, and upon his associations with the persons sending the same; what they import on their face, and whether he knew that the senders were engaged in the conspiracy alleged in the indictment. For it must be understood that, under the established rules of the law, the various acts and declarations of persons other than the defendant are not evidence to show that he was one of the conspirators—for no man's connection with a conspiracy can be legally established by what others did in his absence and without his knowledge and concurrence.

You will also remember, gentlemen of the jury, that confessed conspirators in St. Louis testified that they were frequently warned of proposed visits of agents of the Revenue Service to investigate frauds in this district. Hence, one of the essential inquiries in this case is as to the sources of the information thus given.

According to the testimony of Brooks, he and Hogue, after a visit to New Orleans, arrived in this city on May 4, 1874, to make an investigation concerning the destruction of books at the establishment of Bevis & Fraser. There had been, in January preceding, an unsatisfactory report on that subject by the local officers here, in respect to which it is alleged that Joyce had visited Washington with fraudulent purposes indicated by his dispatches at the time to McDonald, asking the latter to send on report. The result of the investigation by Brooks and Hogue when they were here was the institution of judicial proceedings which culminated in the payment of $40,000 by Bevis & Fraser to the government by way of compromise. Mr. Brooks testified that while here he cautioned Hogue against his familiar association with persons in this city who, though not then considered connected with frauds, are now known to have been actively engaged in them.

The letters of Hogue to Bingham show that early in 1874, if not previously, he (Hogue) had been corrupted, and was working persistently in aid of the conspirators by conveying the information essential to the success of their fraudulent schemes. Bingham had distilleries in Indiana and one here, and information given to him by Hogue was sent to Barton, Bingham's superintendent in St. Louis, and by that superintendant promptly communicated to the other conspirators in this city. It appears that Hogue was in St. Louis from the 12th to the 19th of November of that year, his name being omitted from the hotel register until the day he left. About that time the conspirators here paid him as a bribe the sum of $10,000, and his letters indicate that he worked for a long period, and down to the seizure in St. Louis, in the interests of the conspirators.

The telegraphic dispatches to and from Avery, who was part of the time chief clerk in the treasury department, and part of the time chief clerk in the internal revenue bureau of Washington, are also before you,

and also the frequent visits of McDonald and Joyce to that city, at times when arrivals at St. Louis of revenue agents were apprehended.

These significant facts it is for you to weigh in order to determine whence the needed warnings to the conspirators came. The prosecution contends that the defendant gave from Washington the information needed by the conspirators here, and aided in preventing the visits here which the conspirators were anxious to avoid. The defendant contends, on the other hand, that Hogue furnished the needed warnings, and, perhaps Avery also; that the defendant did not know of the existence of the conspiracy, and gave knowingly no aid thereto; that, as the conspirators had full sources of information through Avery and Hogue, they had no adequate motive in seeking his assistance as a member of the conspiracy, or in permitting him to know of their fraudulent schemes.

That Brashear and Hogue, two of the revenue agents sent here, were bribed by the conspirators remains uncontradicted. The facilities which Hogue enjoyed for learning the plans of the revenue authorities at Washington for the detection of frauds in the west, Rogers, Brooks and Douglass show, and how he used these facilities for the benefit of the conspirators, his letters indicate. In the light of such testimony the jury should examine the alleged connection of the defendant with the conspiracy here, and weigh his acts, conduct and declarations, oral and written. It is not so much from isolated facts and circumstances, as from all of them taken together, and duly weighed, that a right conclusion can be reached. It may often happen that one or many acts, or groups of acts, taken separately, will fail to establish the existence or nature of a general plan, when all of them, considered together in a careful and painstaking way, will show that there was a general and common plan, and disclose the nature and scope thereof.

We have thus endeavored to recall to your recollection the more prominent features of the evidence, not that any part thereof is to be excluded from your attentive and careful consideration, but trusting that these references will bring to your memory the minor and other facts and circumstances, which may shed light on the case.

TESTIMONY OF ACCOMPLICES.

Some of the witnesses on the part of the government, on material and disputed points, are confessed members of the conspiracy, and under indictment therefor. Such a connection with the offence makes them accomplices, and it thus become necessary that the court should state to the jury, the law touching the testimony of such witnesses.

The rule of law is that accomplices are competent witnesses. That means that the parties have a right to have them sworn. It also implies that, when sworn, you shall consider their testimony. They are competent witnesses, and, under the legislation of Congress, they may be compelled to testify. The testimony of conspirators is always to be received with extreme caution, and weighed and scrutinized with great care by the jury, who should not rely upon it unsupported, unless it produces in their mind the fullest and most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts in material respects. It is just and proper to do it. It is not absolutely necessary, provided the testimony of the accomplice produces in the mind of the jury, full and undoubting conviction of its truth.

CREDIBILITY OF WITNESSES.

To the jury exclusively belongs the duty of weighing the evidence, and determining the credibility of witnesses. With that the court has absolutely nothing to do. The degree of credit due to a witness, should be determined by his character and conduct; by his manner upon the stand; his relation to the controversy and to the parties; his hopes and fears; his bias or impartiality; the reasonableness, or otherwise, of the statements he makes; the strength or weakness of his recollection, viewed in the light of all the other testimony, facts and circumstances in the case. If any of the witnesses are shown knowingly to have testified falsely on this trial, touching matters here involved, the jury are at liberty to reject the whole of their testimony on the trial of this case.

CHARACTER OF THE DEFENDANT.

The defendant has produced an impressive array of witnesses of the highest character who have testified to his previous uniform and general good reputation, as a man of unquestioned integrity. This is competent evidence, and the good character of the defendant in this respect is a fact to be weighed and considered by the jury in the light of which they should view all the evidence and determine the question of his innocence or guilt of the crime charged against him in the indictment.

The above is the settled rule of the law in all criminal cases, as well as those in which direct and positive evidence is relied on, as those in which the proof is circumstantial. But in cases of the latter kind the evidence of previous good character has more scope and force than in cases where the proof of the offense is positive and direct. In the language of an eminent judge, speaking of this point: "There may be cases so made out that no character can make them doubtful; but there may be others in which evidence given against a person without character would amount to conviction, in which a high character would produce a reasonable doubt, nay, in which character will actually outweigh evidence which might otherwise appear conclusive." So that we repeat, the evidence on the subject of character is a fact fit and proper, like all the other facts in the case, to be weighed and estimated by the jury, who, when forming their conclusions upon the various facts and circumstances relied on against the defendant, will inquire and determine whether a person whose character is such as the defendant's has been proved to be by the witnesses testifying on that subject has or has not committed the particular crime for which he is called upon to answer. Whart. Crim. Law, 7th edition, secs. 643, 644.

CIRCUMSTANTIAL EVIDENCE.

In cases depending upon circumstantial evidence, certain rules of law have long been settled, which it is essential that you should understand and apply. We adopt, as a correct exposition of the law on this subject, the opinion of the Court of Appeals of New York:

"1. The hypothesis of delinquency or guilt (of the offense charged in the indictment) should flow naturally from the facts proved, and be consistent with them all.

"2. The evidence must be such as to exclude every (reasonable) hypothesis but that of his guilt of the offense imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt *only*, but they must be inconsistent with his innocence. People v. Bennett, 49 N. Y. 144. If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires the jury to give the accused the benefit of the doubt, and to adopt the former. The burden of proof does not shift in criminal cases; it is on the prosecution thoughout to establish the defendant's guilt by the evidence, and in criminal cases the defendant, not being permitted to testify, can not be called upon to explain or produce any proof until the prosecution, by the evidence it actually produces, establishes the defendant's guilt beyond a reasonable doubt."

DEGREE OF PROOF.

The defendant, by the policy of our law, can neither be compelled nor permitted to testify.

As a substitute for this deprivation, the law clothes the defendant with a presumption of innocence, which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt—*beyond a reasonable doubt*—which means that the evidence of his guilt, as charged, must be clear, positive and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient, in a criminal case, to justify a verdict of guilty, that there may be strong suspicions or even strong probabilities of guilt, nor, as in civil cases, a preponderence of evidence in favor of the truth of the charge against the defendant; but what the law requires is proof, by legal and credible evidence of such a nature that when it is all considered by the jury giving to it its natural effect, they feel, when they have weighed and considered it all, a clear, undoubting and entirely satisfactory conviction of the defendant's guilt. This, and this only, is required. But this much is required. If thus proved, the jury should convict; if not, they should acquit.

CONCLUSION.

We trust, gentlemen, that it is unnecessary to remind you that neither partisan feelings nor outside views should have the slightest influence upon your minds as jurors. In every free government it is not only the right, but the duty, of each citizen to form and express, on all suitable occasions, his convictions and opinions as to governmental policies and party organizations. It is natural and proper for him to join such a party as most nearly accords with his views. But such views and party associations should remain entirely outside of the jury-box. No popular or partisan clamors, no extraneous wishes or considerations, no thoughts other than those which pertain to strictly impartial justice, can be permitted to invade the sanctity of the jury-room, to bias or warp or even shade its deliberations, without destruction of the safeguard to life, liberty and property furnished through trials by jury. It has been often and forcibly said, that so long as trials by jury retain their full force, impartiality and purity, the liberty, and rights of the citizen, are alike safe against despotism and anarchy. If popular clamor usurp the judgment seat the era of Marats and Robespierres will return, and frenzied factions sweep away all justice and right. So will justice be gradually undermined if outside influences are suffered insidiously to enter within that threshold where nought should be known save the sworn evidence in the case, and the rules of law as pronounced by the court—rules which the experience and wisdom of ages have demontrated to be essential to the ascertainment of truth and the due administration of justice.

It will be a sad and shameful day for this country when courts and juries, having lost their independence, shall sit simply to register the edict of popular opinion to acquit this man or convict that one.

Thus we commit this case, with all its issues, to your decision, and may the good Father of us all give you the light to see and the grace to discharge your duty.

Correspondence.

WELTON V. THE STATE—A CORRECTION.

ST. LOUIS, Feb. 23, 1876.

EDITORS CENTRAL LAW JOURNAL:—"The credit of procuring the declaration of law given in this case is due Hon. James S. Botsford, United States Attorney for The Western District of Missouri, by whom the cause was removed to the Supreme Court of the United States and there ably argued. For this service Mr. Botsford is entitled to the thanks of the whole mercantile community."

Will you let me correct the error contained in the above editorial notice of the case of Welton v. State of Missouri, in last week's number of your journal? *Ante*, p. 106. The facts are, first, it was not Mr. Botsford's case; secondly, "the credit," etc., is not due to *him*, and thirdly, *he* is *not* "entitled to the thanks," etc. The credit and thanks are due solely to S. M. Smith, a lawyer of this city. He advised the sewing machine companies that the law of this state concerning peddlars was in conflict with the constitution of the United States, and void. Upon this advice he was employed by them to test the question up to the court of last resort.

Welton having been soon afterwards indicted in Henry county, for

peddling without a license, Mr. Smith defended, and a demurrer to the evidence raising only the question of the unconstitutionality of the law, having been overruled, he appealed the case to the supreme court of this state, and argued it there, and, the judgment being affirmed, at once took measures to sue out a writ of error to the Supreme Court of the United States, and not having time to go to Jefferson City for the purpose, sent the necessary papers to Mr. Botsford there, who made the formal application, for which services he was paid by Mr. Smith, and the case was removed to the supreme court at Washington.

After the case had been pending there for sometime, Mr. Smith arranged with the Attorney-General of Missouri, to submit it on printed briefs under rule XX. of the court, and for that purpose went to Washington, and attended to the matter, filing his briefs, etc.

The only other connection that Mr. Botsford had with the case, was that some months after it was removed to the supreme court, he requested of Mr. Smith the favor of being allowed to file a brief in the cause, which was granted him, with the express assurance from Mr. Smith, that he didn't desire any assistance in the matter, but he could file it if he desired. He did so; but was never known in the matter by Welton or the sewing machine companies, and he never made any charge or received any pay for his services.

The above are the facts, and no doubt Mr. Botsford will disclaim deserving any particular credit, or extraordinary fame in the matter, when his attention is called to them. SMITH P. GALT.

Recent Reports.

FIFTY-FOURTH NEW HAMPSHIRE REPORTS.—REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. By JOHN M. SHIRLEY, State Reporter. Concord: Josiah B. Sanborn. 1875.

During the passage of this volume through the press we were kindly provided with the advance sheets, through the courtesy of the reporter, from which we have made abstracts of more than thirty of the ninety-four cases contained therein. The decisions of the Supreme Court of New Hampshire stand deservedly in the front rank, and for weight, learning, accuracy, and sound law are, perhaps, surpassed by the decisions of no other court in this country. The reporter himself is a *lawyer*;—what more could be said? His ability to edit and prepare cases for publication is second to none, and to him is due not a little of the commendation which this volume of his reports deserves. We are pleased to have this opportunity to express our gratification at the receipt of many favors from him, and to testify to his uniform kindness and courtesy, which none have better reason to know than ourselves. We make the following excerpts, in addition to those already published by us:

Amendment.—Although the statute has conferred a very broad discretion upon the court in relation to the pleadings in cases of review, yet an amendment of the declaration will not be allowed in such a case, which changes the form or the cause of action. *Pearson v. Smith et al.* p. 65.

Name of Witness—Count in Indictment—When Verdict will not be set aside.—1. A witness in a capital case will not be excluded because the list of witnesses furnished to respondent does not contain his true name, if it contains the name by which he is known. 2. In an indictment for murder, a count which charges that respondent "in some way or manner, and by some means, instrument, or weapon, to the jurors unknown," killed and murdered the deceased, is good. 3. A general verdict of guilty of manslaughter in the first degree being returned on a trial under an indictment which contains several counts, judgment will not be arrested, nor will the verdict be set aside, because there is one count under which, had there been no other, the jury would not have found the respondent guilty of manslaughter in the first degree. *State v. Burke*, p. 92.

Order of Notice when Returnable.—An order of notice upon a petition for laying out or altering a highway, whether filed in term-time or in vacation, must be returnable to the next term; the court has no authority to make it returnable during an existing term. *Bull v. Westmoreland*, p. 103.

Practice—Pleas in Bar.—1. If after a plea in bar, the defendant pleads a plea *puis darrein continuance*, this is a waiver of his plea in bar, and he shall take no advantage of anything in the bar in that case. 2. But such plea *puis darrein continuance* may be properly pleaded with the general issue, either specially or by brief statement, when no plea has been previously pleaded. 3. The fact that two or more pleas, when pleaded at the same time, are repugnant to each other, is no objection to either of them. *True v. Huntoon*, p. 121.

Sureties upon a Recognizance.—The court will not discharge the sureties upon a recognizance, upon the petition and notice prescribed by the statute, if the surrender of the principal was prevented by any fault of the sureties in connection with the act of God, or of the government, or the sentence of the law. *State v. McAllister*, p. 156.

Description in a Deed—Parol Evidence.—1. "Thence westerly to the road," in a deed of land, is by legal construction a true description of a line extending westerly to the centre of said road. 2. Parol evidence of the understanding or agreement of the parties to such a deed, that the easterly margin and not the centre of the road should be the westerly boundary of the land conveyed, is not admissible to control the deed. *Goodeno v. Hutchinson*, p. 159.

Construction of Will—Parol Request by Testator—Waste by Trustee.—1. The will of G. R. contained the following provision: "I order and direct that the remainder of my ship-yard, from and *after* the death or marriage of my wife, shall be used and managed to the best advantange for the equal benefit of my three sons." *Held*, that this provision can not be construed as directing the manner in which it should be used *before* her death or marriage. 2. Evidence of a parol request or direction by a testator to carry on a certain business after his decease, for the benefit of his family, is inadmissible. The powers and duties of trustees under a will cannot be controlled by such evidence. 3. If a trustee who is entitled to a share of the income of the trust-fund wastes the estate, his share of the income is to be applied, first, to make good the deficiency in the income, and, second, the deficiency in the trust-fund. *Raynes v. Raynes*, p. 201.

Divorce.—In a libel for divorce by husband against wife, certain facts respecting the purchase of land by the wife in her own name, which tended to show a resulting trust thereto in the husband, were set forth, and the prayer was for a divorce; and that the libellee be decreed to relinquish said land to the libellant, or a trustee, for the support and education of certain minor children of the parties. *Held*, that the libel might be amended by striking out that part relating to the equitable title to the land, and a hearing thereon be had on the questions of divorce, and provision for the children out of the estate in controversy. *Whipp v. Whipp*, 580.

Amount of Judgment when rendered upon Review.—The plaintiff recovered judgment against the defendant, who paid the amount of said judgment and reviewed the action, and upon review succeeded in reversing the original verdict, and obtained a verdict in his favor. When the judgment in the action of review is rendered, it should be for the whole amount paid in the first judgment, and interest thereon from the time of payment to the time of the judgment in review. *Ordway v. Haynes*, 346.

Chattel—Mortgage.—A sale of a chattel by the mortgagor, with the consent of the mortgagee, will convey a good title to the purchaser, even though such consent be not in writing, or, if it be so, though it be not entered or endorsed upon the mortgage or the record of the same. *Roberts v. Crawford*, 532.

Railway Taxation.—If a railroad corporation, situated in another state, pays a specific tax upon all its capital invested or expended, whether represented by capital stock, or indebtedness of the corporation, and such taxation is declared to be in lieu of all state, county, township, or other taxes in that state, and it appears that such specific tax was intended to be a fair equivalent for the taxes that would otherwise be laid on such property by the ordinary means of taxation, such property should not again be taxed in this state, to the owners of shares of the capital stock of such corporation. *Kimball v. Milford*, 406.

Husband and Wife.—A declaration in *assumpsit* by husband and wife, is not supported by evidence of a promise to the wife *dum sola*. *Alexanders v. Goodwin*, 423.

BUSH'S KENTUCKY REPORTS. VOL. IX. Reports of Selected Civil and Criminal Cases Decided in the Court of Appeals of Kentucky. By W. P. D. BUSH, Reporter. Vol. IX. Containing Cases Decided at Summer and Winter Terms, 1872, and Summer Term, 1873. Louisville, Ky.: Published by John P. Morton & Co. 1875.

In our issue of January 28th, we called attention to several cases taken from this volume, and we now refer to the whole work. Mr. Bush has had considerable experience in reporting, and this last evidence of his ability is fully equal to its predecessors. In it may be found the unusually large number of one hundred and thirty cases, given in full, requiring 872 compact pages. In addition to the reports, there are memorial notices of the Hon. Geo. Robertson, late Chief Justice of the Kentucky Court of Appeals, who died on the 16th of May, 1874, and of the Hon. Mordecai R. Hardin, the successor of Mr. Robertson, who died on the 3rd of January, 1875. There are also given full lists of the principal state officials, including the judges of the different state and county courts, the state officers, and the commonwealth's attorneys. The book closes with a complete index and sub-index, the former giving the adjudicated points under their appropriate headings, and the latter comprising a list of the legal topics under which the cases range themselves. The habit, so common with reporters, of quoting the citations of counsel is often worse than useless, for not infrequently courts decide cases on grounds not touched upon by attorneys, and writers of briefs frequently seek to give their arguments weight by citing many cases not bearing directly on the subject. Mr. Bush has carried this plan to its utmost limit. However, he has, as a rule, carefully verified these citations, so that he has escaped one charge often successfully made against reporters and text writers. We regret to see so many instances where the number of the page has been omitted, and we also have to note that over five hundred cases are cited merely by volume and page, the names of the parties being omitted. We append a few citations:

Part Performance — Recission.—1. Before it can be decided whether an agreement has been in part performed, the antecedent questions must be decided; that is, did the plaintiff and defendant agree, and what were the terms of this agreement? According to the statute, these preliminary questions can only be responded to by written evidence. 2. The defendant sold his expectancy of one-third of two hundred acres of land owned by his father, and also seven acres and seventeen poles of land, at the price of thirty-five dollars per acre. The

seven-acre tract was conveyed by deed, but as to the one-third of the two hundred acres, there was no conveyance or writing, evidencing the contract. The plaintiff sold and conveyed the seven-acre tract, and afterward instituted this action to recover title to the one-third of tho two hundred acres, or to rescind. The contract is rescinded, and the defendant is required to refund the amount received, after deducting the value of the seven-acre tract. *Holtzclaw v. Blackerby*, p. 40.

Forfeitures in the Nature of Liquidated Damages.—1. Forfeitures are regarded by courts with little favor, and will seldom be upheld, if intended to operate as penalties. But there are cases in which parties will be allowed to agree upon a definite sum as the amount of damages which may result from a violation of their contract. 9 Dana, 206; Sedgwick Meas. Dam. 422. 2. The character and importance of the work, and the great difficulty in estimating the damages resulting from the failure to perform a contract for the construction of any portion of a railroad, render it just and proper, that the party so failing, should be held to pay the stipulated forfeiture, unless it be so exorbitant that to enforce its payment would be to inflict a penalty on the party in default, instead of merely making good the injury sustained by reason of the breach. *Elizabethtown, etc., V. R. Co. Geoghegan*, p. 56.

Homestead Exemption—Dower.—1. Homestead exemption after the death of the husband, continues for the benefit of his widow and children, but shall be estimated in allotting dower. 2. Dower of widow is increased in certain cases, by the homestead exemption act of February 10, 1866. 3. If one-third of the deceased debtor's land is of less value than one thousand dollars, the widow is entitled to have allotted to her, as for her dower, so much of the land, including the homestead, as was of the value of one thousand dollars. *Gasaway v. Woods*, p. 72.

Tenants by Entireties.—The interest of the husband in lands held by himself and wife as tenants by entireties, may be sold by a court of equity, and its proceeds applied to the payment of his debts; provided it be so done as neither to affect his right of ownership, nor her right to the enjoyment of her land during her life, whether she survives her husband or not. *Cochran et al. v. Kerney*, p. 199.

Murder—Evidence—New Trial.—1. On a trial for murder, evidence of previous threats of the accused was given, the witness stating that the name of the deceased was not called, but that witness took it that accused was talking about deceased; *held*, error to admit this testimony against defendant's objection. 2. In a criminal prosecution incompetent evidence was admitted, to which the defendant excepted. In the written grounds for new trial, this error was not mentioned; *held*, that the judgment should be reversed for the admission of incompetent evidence, the criminal code not requiring such errors to be specified in the grounds for new trial. 3. A judgment of conviction can not be reversed because the verdict is not sustained by the evidence. *Johnson v. Commonwealth*, p. 224.

Mistake—Relief by Equity.—In an action by the lessor to recover damages of his lessee by failing to commence operations as covenanted in the lease, the defendant, by appropriate cross-pleadings, sought to be entirely released from the contract, on the ground that it was executed in consequence of the mutual mistake of lessee and lessor, that there was oil on lessor's land. The circuit court erred in failing to transfer the action to equity for preparation and trial on the lessee's claim to be relieved for mistake in the contract. *Bell v. Fruit*, p. 257.

Congregational Church Jurisdiction—Actionable Words require Malice.—1. When persons have voluntarily associated themselves with a society of Christians, recognizing no ecclesiastical tribunal with authority to revise its final determination, such a church is what is denominated Congregational, and has the exclusive right to deal with its defaulting members, and this court cannot supervise or control its jurisdiction. 2. Every person entering into a church, impliedly, if not expressly, covenants to conform to its rules, to submit to its authority and jurisdiction. 3. The regularly constituted officers of a church, acting in good faith and within the scope of their authority, will be protected by law. The privilege connected with proceedings in courts of justice is extended to other *quasi* judicial proceedings, especially if the jurisdiction and action be of a confidential nature. 4. Words written or spoken in the regular course of church discipline, or before a tribunal of a religious society, to or of members of the society, are as among the members themselves privileged communications, and are not actionable without *express malice*. 5. No words written or spoken are actionable unless published with malice, express or implied; and although malice will be implied *prima facie* from the falsehood of a slanderous imputation, yet the manner and occasion of the publication may rebut such an implication, and impose on the plaintiff the burden of proving express malice. *Lucas v. Case*, p. 297.

Conveyance of Crop to be raised.—A mortgage of a crop to be raised on a farm during a certain term passes no title, if the crop was not sown when the mortgage was executed, and the mortgagee has no claim against a purchaser of the crop for it or its value. *Hutchinson v. Ford*, p. 318.

When the Note of One Partner binds the Firm.—1. If the individual note of one partner is accepted as a merger of a partnership liability, the other partner is hereby exonerated from any legal responsibility for the debt, whatever his liability at first may have been. 2. But if the individual note of one partner was given and accepted not merely as the note of that partner, but was meant and intended as an obligation for and on behalf of the firm, its acceptance did not exonerate the other partners from responsibility. (Macklin's ex'rs v. Crutcher, 6 Bush. 401; Gow on Partnership, 56.) *Smith v. Turner's admr.*, p. 417.

Title to Personalty by Adverse Possession.—1 Five years' continued adverse possession of a stolen horse by an innocent holder, or by two or more innocent holders, under a claim of title, invests such holder with a good legal title, and the statute of limitations will bear an action for his recovery. 2. The purchaser of a stolen horse does not acquire title to the horse by reason of his purchase from the thief, but such purchaser and his vendees acquire title by reason of their possession under claim of title continuing for more than five years before the institution of the action. *Dragoo v. Cooper*, p. 629.

Attorney's Lien for Fees.—1. Damages for wrongfully suing out an attachment against the property of the plaintiff constituted the claim in litigation in this case. 2. The lien of plaintiff's attorney on a judgment against the defendant can not be defeated, on the motion of the defendant, by setting off one judgment against another, as provided in sec. 407 of the Civil Code. But in an action which is subject to a set-off, and which is so barred, the attorney's claim for services must, like the plaintiff's demand, yield to the set-off, as it would to any other available defense to the action. *Robertson v. Shutt*, p. 659.

Briefs.

[The purpose of this column is to aid practitioners in the exchange of briefs on important subjects. For this reason, it is impossible for us to notice any brief which does not contain a statement of the case involved. It would be more satisfactory to all concerned, if those sending briefs should send with them succinct outlines of the points.—Ed. C. L. J.]

Nature and Powers of Corporations.—St. Joseph Building Co. v. Horne, and Same v. Layton. United States Circuit Court, Kansas. Argument for defendants, pp. 15. The plaintiff is charged with acts beyond and outside of its powers, and the argument considers corporations foreign and domestic, their properties, qualities and rights. Numerous authorities cited. [Address Messrs. Guthrie & Brown, Topeka, Kan.]

Jurisdiction—Replevin.—Kaster v. Pease. Supreme Court of Iowa. Brief for defendant and appellee, pp. 22. There were two points in this case: first, the question of the jurisdiction of a district court to seize property by replevin which is in the possession of an officer by virtue of an execution issued from the circuit court of the same county, and, second, whether or not, as the property was in the hands of the defendant as county sheriff, it was imperatively necessary to notify him in writing of the plaintiff's claim before instituting this suit. [Address J. Van Volkenberg, Esq., Fort Madison, Iowa.]

Conflict of Mortgages and Titles.—Roberts v. Wood *et al.*, Supreme Court of Wisconsin. Case and argument for plaintiff, pp. 46 and 17. Action for foreclosure of mortgage made by defendant W. to plaintiff to secure certain promissory notes. Defendant G. claims title to a part of the land by virtue of a warranty deed, executed to him by W. subsequent to the mortgage to plaintiff. Defendant N. claims under a tax deed. The defense is based on the ground of fraud and deceit. Plaintiff holds that the notes were negotiable, though secured by mortgages and though all the papers are in some way unknown to W., the maker, taken from a safe where he placed them and put upon the market. [Address Davis & Flanders, Milwaukee, Wis.]

As our readers may be interested in the result of this case, we subjoin a statement of the case and the opinion of the court, as follows:

This is an action to foreclose four mortgages on real estate purporting to have been executed by the defendants, Wood and wife, to the Milwaukee and Horicon Railroad Company, to secure the payment of a like number of promissory notes of even date therewith purporting to have been made by said Wood, and payable by the terms thereof to said railroad company or order. Four parcels of land are included in these mortgages, one parcel in each of them. No claim is made in the complaint to recover for any deficiency—such claim, which was originally inserted therein, having been stricken out by way of amendment. The printed case states that the defendant, Wood, answered a discharge in bankruptcy dated September 14th, 1869, but his answer is not found in the record returned to this court. The defendant Norton answered setting up title in himself to the mortgaged premises, subsequent to the mortgage but paramount thereto, under a tax deed followed by actual possession for more than three years and the payment of taxes subsequently accruing thereon. The defendant, Granger is the owner by subsequent conveyance from Wood of the equity of redemption in and to all of the lands included in three of the mortgages in suit, but has no interest in the parcel covered by the fourth mortgage. Granger's answer attacks the validity of the mortgages and denies that they were delivered by Wood to the railroad company. This answer also contains a counter claim, and demands that the mortgages be surrendered and cancelled. The mortgages in suit and the notes which they were given to secure were executed (excepting delivery) about the same time that the promissory note was made, which is the subject matter of the case of Roberts v. McGrath, 2 Cent. L. J. 734, decided herewith, and under very similar circumstances, and were deposited by Mr. Wood personally in the safe of Mr. Scott, subject to the order of Mr. Wood alone. The securities were obtained from the safe of Mr. Scott by the agent of the payee at the same time and by the same fraudulent pretences that the note and mortgage of McGrath were obtained therefrom, and were in like manner negotiated by the payee before due and for value to the plaintiff who is a *bona fide* holder thereof. For a more detailed statement of those transactions reference is made to the report of that case. The circuit court found among other things that there had been no delivery of the mortgages by the mortgagors, and that they were not chargeable with any negligence in the premises, and gave judgment dismissing the complaint and for the surrender and cancellation of all the mortgages, as prayed in the counter claim of the defendant, Granger. The plaintiff has appealed from such judgment.

Lyon, J.—The cases of Roberts v. McGrath [*supra*] and Chipman v. Tucker, Id. (decided herewith) involve the same questions presented by this appeal concerning the validity of the mortgages sought to be foreclosed in this action and but little need be added to what was said in those cases on the subject. Mani-

festly there was no delivery of the mortgages. This is a stronger case against delivery than that of Roberts v. McGrath, for Mr. Powers had nothing to do with their deposit in the safe of Mr. Scott, and delivery cannot possibly be predicated of any act of his. The evidence fails to prove that the mortgagors were guilty of such negligence in the premises as estop them, or those claiming under them, to deny that the mortgages were delivered. There was some evidence tending to show that the safe in which the securities were deposited was not always, perhaps not usually, kept closed and locked, and that they might easily have been purloined therefrom. But inasmuch as they were not purloined or taken from the safe clandestinely, but were obtained from the clerk of Mr. Scott by means of false and fraudulent statements and pretences, the fact that the safe was habitually and carelessly left open (if such was the fact) is of no importance. Locks and bolts were unavailing against the means employed to obtain the securities. From the time of the deposit of the mortgages until they passed into the possession of the railroad company, the defendant and mortgagor, Joseph Wood, who had the control of them, was absent from Grand Rapids attending a session of the legislature, of which he was a member. After his return he learned that the securities had been taken from the safe, and he seems to have made reasonable efforts to reclaim them. He demanded them of the railroad company and commenced and prosecuted an action to compel a surrender and to obtain a cancellation of them, but without avail. As respects the alleged negligence of the mortgagors, there is nothing in this case to distinguish it in principle from that of Chipman v. Tucker, *supra*, and what is there said on that subject by Mr. Justice Cole is applicable here.

We therefore affirm the judgment so far as it affects the defendant Granger, who alone denied the validity of the mortgages, and hold that the three mortgages which affect the lands in which he has an interest were properly adjudged to be surrendered and cancelled.

It should be remarked in this connection that it is quite immaterial, so far as Granger is concerned, that in certain bankruptcy proceedings the defendant Joseph Wood scheduled the indebtedness mentioned in these mortgages as valid claims against himself. This was done long after Granger took a conveyance of the mortgaged lands and cannot affect his rights in the same.

The defendant Norton claimed under a title which, if valid, was paramount to the mortgage interest although subsequent thereto in time. It is well settled that the validity of his title cannot properly be litigated in this action. Strobe v. Downer, 13 Wis. 10; Petton v. Farmin, 18 Id. 222, and cases cited. Indeed no attempt was made to do so on the trial, but the tax deed was received in evidence under objection for the sole purpose of showing that the defendant Norton, the grantee named therein, was in a position to contest the validity of the mortgages. But in his answer Norton does not attack their validity, but rests his defense thereto entirely on his paramount title. It was said by Mr. Justice Paine, in Petton v. Farmin, that "if the party alleged to claim some interest subsequent and subject to the mortgage, claims none he should disclaim and the suit should be dismissed as to him." There is no such formal disclaimer in the answer of Norton, but the assertion by him of a paramount title is equivalent thereto. For these reasons, and not because the mortgages never had a legal existence, the action was properly dismissed as to him.

The record fails to show that the mortgagors contested the validity of the mortgages; it only shows that the defendant Joseph Wood answered his discharge in bankruptcy. Such discharge does not interfere with the plaintiff's right to have a foreclosure of his mortgages; it only prevents a judgment against Wood for any such deficiency. Inasmuch as no defendant who has any interest in the land included in one of the mortgages has attacked the validity of that mortgage, the plaintiff is entitled to a foreclosure thereof. The judgment must therefore be reversed as to the mortgagors and the cause will be remanded for further proceedings in accordance with this opinion.

Homestead—Bankruptcy.—In our issue of December 24th, of last year, in our news column, we called attention to the case of Jackson v. Allen, Supreme Court of Arkansas, where it was ruled, that a judgment lien on a homestead may be enforced by execution sale, as soon as the land is abandoned as a homestead, although the defendant may in the meantime be discharged in bankruptcy. We have received the argument of defendant's counsel, which we commend to the consideration of the profession; although as to Arkansas, the question is settled by Art. IX., sec. 3, Const. of 1874, which provides that the homestead shall not be subject to any lien, or to any sale, except for taxes, etc. [Address L. A. & X. J. Pindall, Watson, Ark.]

Mistake—Its Nature and Scope.—Cassidy v. Metcalf; St. Louis Court of Appeals. Brief for plaintiff, pp. 19. This was a bill in equity to reform a written contract on the ground of mistake. A contract was made, conveying Cassidy "interest" in a certain business; and it was sought to insert words showing that this word meant the good will of the firm in which Cassidy had an interest. The whole subject of mistake is discussed, and this brief will well repay study. The defendant's counsel say: "Before the written contract can be proved to be variant from the actual contract made between the parties, it must be shown that the actual contract as claimed, was fashioned by the parties into words and phrases, and further that some particular word or phrase was accidentally omitted in reducing the contract to writing." To which plaintiff replies: "This doctrine practically abrogates the jurisdiction of equity for the reformation of contracts altogether; for when do men agree upon the terms of a formula by which to express the *aggregatio mentium*, before the formula is actually reduced to writing? How frequently, we may say how universally, is it true, that this *aggregatio mentium* is reached with the interposition of but few words, or phrases, which far from expressing the comprehension of the contract serve but as *indicia* to the conclusion reached." [Address Ellis & Sullivan, St. Louis, Mo.]

Legal News and Notes.

—During the present session of the Ontario Assembly, the lawyers have not been idle. Law reform is still the order of the day; and the jury system, that fertile subject for experiment, has not been left unassailed. Mr. Bethune the other day introduced a bill to alter the rule in civil cases, requiring the verdict of juries to be unanimous. He proposed that, after a jury had been out an hour, it should be permitted to render a verdict of eleven of their number; after an absence of two hours, a verdict of ten; and, after an absence of three hours, a verdict of nine; and that in each case such a verdict should have the full force of a unanimous verdict. A bill of the same nature was laid on the table a year or two ago, by a young gentleman who sat on the left of Mr. M. C. Cameron in opposition. So daring an innovation, attempted under such auspices, of course came to no good end. Mr. Bethune's bill met with more respect, having been thrown out on the second reading, on an equal division in a full House.—[*Canada Law Journal.*

—Testaments of Idiots—Justice Speaking out of the Mouths of Fools.—Swinburne in his Treatise on Wills (Part 2, § 4, p. 70) illustrates the subject of the testaments of idiots in a manner both quaint and interesting. He says:

"But what if an Idiot or Naturall foole should make his Testament so well and wisely (in appearance) that the same may seeme rather to be made by a reasonable man, then by one void of discretion? Whether is this Testament good in law, or no? Surely some have been of this opinion, that such a Testament is good and available in law, because Almighty God doth sometimes so illuminate the minds of the foolish, that for that present in that case, they are not much inferior to the wise. And to this purpose divers credible writers doe remember a merry accident, which (if they say truly) was no fable but undoubted fact, and this it is.

"At Paris one morning a hungry poore man begging his almes from doore to doore, did at the last espie very good cheere at a Cookes house; whereat by and by his teeth began to water, and the spurre of his emptie and eager stomach pricking him forwards, he made as much haste towards the place as his feeble feet would give him leave: where he was no sooner come but the pleasant smell, partly of the meat, partly of the sauce, did catch such sure hold of the poore man's nose, that (as if he had been fast holden with a paire of pinsers) he had no power to pass from thence, untill he had (to stay the furie of his raging appetite) eaten a piece of bread which he had of charitie gotten in another place. In eating whereof, his sense was so delighted with the fresh smell of the Cookes cates, that albeit he did not lay his lips to any morsell thereof, yet in the end his stomach was so well satisfied with the onely smell thereof, that he plainly acknowledged himselfe thereby to have gotten as good a breakefast, as if he had indeed there eaten his belly full of the best cheere. Which when the Cook had heard, being an eggregious wrangler and an impudent companion, what doth he but all hastily steppes forth to the poore fellow, layes fast hand upon him, and in a hot, cholerick mood, bids him pay for his breakefast. The honest poore man half amazed at this strange demand, wist not well what to say: but the Cook was so much the more fierce and earnest, by how much he preceived the good man to be abashed at his boldnesse; and did so cunningly cloke the matter, that in the end the poore man was contented to referre the deciding of the controversy to whatsoever person should next pass by that way, and, without more adoe, to abide by his judgement. Which thing was no sooner concluded, but by and by cometh unto the place a very naturall foole, and such a notorious Idiot, as in all Paris his like was not to be found. All the better for me, thought the Cook, for more he doubted the sentence of a wise man then of a foole. Well, sir, to this foresaid Judge they rehearsed the whole fact, the Cook cruelly complaining, and the other patiently confessing as before; a great multitude of people were gathered about them, no lesse desirious to know what would follow, then wondering at that which had gone before. To conclude, this naturall preceiving what money the Cook exacted, caused the poore man to put so much money betwixt two Basons, and to shake it up and down in the Cookes hearing, which done he did arbitrate and award, that as the poore man was satisfied with the onely smell of the Cookes meat, so the Cook should be recompenced with the onely noise of the poore man's money. Which judgment was so commended, that whoso heard the same thought if Cato or Solomon had been there to decide the Controversie, they could not have given a more indifferent or just sentence.

"The like case is reported to have happened at Bononia: There a certain covetous man lost his purse, with 21 Ducats in it, which, when he could not recover with diligent search, he fared like a mad man, and in the end was ready to have hanged himselfe for sorrow. An other honest man having found such a purse, moved with compassion, came and delivered the same to this covetous person, who, never thanking the bringer, fell forthwith to telling of the money, and finding but 20 Ducats therein, with great greedinesse he exacted the odd Ducate; which because the finder denied, he is brought before the Magistrate, a man of very great wealth, but of very little wit (but such Magistrates are many times elected, where the matter lieth in the mouthes of the multitude). The one party sweareth that there were 21 Ducats in the purse which he lost. The other party sweareth that there were but 20 Ducates in the purse which he found. The Magistrate, although a foole giveth no foolish sentence, for he pronounced that the purse which was found, was not that purse which was lost, and therefore condemned the covetous person to restore the 20 Ducats to the other party. "By these reasons and examples therefore it may be reasonably inferred, that if a fool doe make a wise and reasonable Testament, the same ought to be allowed as lawful. Nevertheless this is the truer opinion, that such a Testament is not good in law; the reason is because a Testament is an act to be performed with discretion and judgment. But a naturall foole, by the generall presumption of law, doth not understand what he speaketh, though he seeme to speak reasonably, no more then did Balaam's asse when he reasoned with his Master, or doth a Parrat speaking to the passengers. And, although Almighty God do sometimes so illuminate the mindes of very naturall fooles and Idiots, that they doe well preceive and understand what they speake; yet, because this thing happeneth but very seldome, the Law doth not presume the same by occasion of words onely. And, therefore, unlesse farther proofe be made thereof by other circumstances, the law doth not approve such Testaments. Indeed if it may appear by sufficient conjectures that they had the use of reason or understanding at such times as they did make their Testaments, then doth the former opinion take place, that such testaments are good in law.